No. 20068

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

JIM GARVISON, ET AL., *Appellants*

v.

NORMAN A. JENSEN, *Appellee*

ON APPEAL FROM A JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON

BRIEF FOR AMALGAMATED MEAT CUTTERS AND BUTCHER WORKMEN OF NORTH AMERICA, AFL-CIO, AS AMICUS CURIAE

LESTER ASHER
228 North LaSalle Street
Chicago, Illinois 60601

BERNARD DUNAU
912 Dupont Circle Building
Washington, D. C. 20036

Attorneys for Amicus Curiae

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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BRIEF FOR AMALGAMATED MEAT CUTTERS AND BUTCHER WORKMEN OF NORTH AMERICA, AFL-CIO, AS AMICUS CURIAE

JURISDICTIONAL STATEMENT

This case is before the Court on appeal from a judgment of the District Court entered on February 2, 1965. In part the judgment invalidated the participation of retired employees and officers and employees of the contracting union as beneficiaries of jointly administered trust funds on the

ground that participation by these classes of employees was barred by section 302 of the Labor Management Relations Act, 1947.[1] The jurisdiction of the District Court was invoked under section 302(e) of that Act, empowering the "District Courts of the United States . . . to restrain violations of" section 302. The jurisdiction of this Court rests on 28 U.S.C. § 1291.

Leave to the Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO, to file a brief as *amicus curiae* was granted on May 24, 1965. The interest of *amicus curiae* is limited to the statutory eligibility of retired employees and officers and employees of the contracting union to participate as beneficiaries of a jointly administered trust fund. This amicus brief is confined to this question.

STATEMENT OF THE CASE

Pursuant to a collective bargaining agreement entered into on January 22, 1962, between Chapters of the Painting and Decorating Contractors of America and local unions of the Brotherhood of Painters, Decorators & Paperhangers of America, a medical-hospitalization trust fund which had been established in May 1953 was continued, and a pension fund was formed (58 LRRM at 2690; PTO, p. 3, ¶ 1[2]). Administration of each fund is reposed in eight trustees, four to be selected by the employers and four to be named by the union (58 LRRM at 2690). Employers contribute to both funds in amounts specified by two implementing Agreements and Declarations of Trust separately applicable to each fund (*ibid.;* PTO p. 2 ¶¶ 3, 5).

Each Declaration of Trust provides that the union could be treated as an employer with respect to certain of the

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1 29 U.S.C. § 186, 61 Stat. 157 (1947), as amended, 73 Stat. 538 (1959).

2 "LRRM" refers to the opinion of the District Court as reported at 58 LRRM 2689; "PTO" refers to the pretrial order; "pl. ex." refers to plaintiff's exhibits and "def. ex." to defendants' exhibits.

union's employees for the purpose of making contributions to the two funds for the benefit of these particular employees (58 LRRM at 2690). Coverage within the pension fund is prescribed by the following provision (pl. ex. 2, p. 2):

> It is understood that the Union party to this agreement may be considered an employer hereunder if permitted by law or governmental regulations to be so considered with respect to employees directly employed by such Union in its own affairs; provided, however, that the Union shall be considered as an employer hereunder in such event for the sole purpose of being able to include its employees as beneficiaries of this Pension Plan and shall not be considered as an employer for purposes of the obligations and rights reserved to employers otherwise defined herein and, provided, further, that only union employees who occupy positions in which they participate in the furtherance of the business of the Union may be so included as distinguished from clerical or stenographic employees.
>
> . . . The term "employee" as used herein . . . shall also include employees of the Union as hereinabove provided if the Union elects to include such employees as beneficiaries of the plan and so notifies the Trustees in writing of its election.

Coverage of union employees within the medical-hospitalization fund is prescribed under the term "associate employees" which includes *inter alia* "employees of the Union . . . whom the Union . . . elects to cover under this trust fund on a uniform nonselective basis, as determined by the Trustees" (pl. ex. 4, art. I, sec. 3, p. 2). Contributions on behalf of "associate employees" are fixed at "a monthly amount" which "shall be commensurate with the insurance premium charged to provide insurance coverage for employees within the bargaining unit. The Union, however, may elect to make payments on an hourly basis in the same amounts as provided by the collective bargaining agreement for those employees who occupy

positions in which they directly participate in the furtherance of the business of the Union, as distinguished from clerical or stenographic employees" (pl. ex. 4, art. III, sec. 1(j), pp. 6-7). Minor exceptions aside, it appears that coverage under the pension fund was extended to union business representatives and a financial secretary, and under the medical-hospitalization fund to the same individuals plus union stenographers.[3]

Since January 15, 1958, under the authority of a resolution adopted on that date, retired employees and their wives have been covered by the medical-hospitalization fund and medical benefit payments have been made to them (58 LRRM at 2690). To be eligible for participation the retired employee (1) must have been insured under the group policy between the carrier and the fund immediately preceding his date of retirement, and (2) on his retirement he must (a) have attained at least 65 years of age, (b) have completed at least 12 years of service in the industry after attaining the age of 45 years, (c) have had at least 12 months of coverage as an active employee since January 1, 1955, (d) be eligible for social security benefits, and (e) not be eligible for any benefits under the fund other than as a retired employee (def. exs. 1, 16 (p. 22), 24).

The pension and medical-hospitalization funds as jointly administered trusts created for the purpose of conferring benefits upon employees is regulated by section 302(c)(5) of the Labor Management Relations Act, 1947. Appellee contended, and the District Court agreed, that section 302(c)(5) bars retired employees and union officers and employees from eligibility to participate as beneficiaries of a jointly administered trust. Debarment of union officers and employees was predicated upon the view that employer status under the statute extends only to "an industrial employer . . . and not the union in its capacity as an

3 Plaintiff's brief in the District Court, pp. 6-7, 9-10.

employer of its own personnel'' (58 LRRM at 2691). Debarment of retired employees was predicated upon the view that upon retirement "said persons are no longer employees'' (*id.* at 2692).

THE INTEREST OF AMICUS CURIAE

Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO, is an international labor organization with about 335,000 members. Its 413 local unions represent employees throughout the United States, Canada and the Canal Zone. Its jurisdiction extends to meat packing houses, retail food stores, canneries, tanneries, poultry and fish companies, the fur trades, and related industries.

The District Court's interpretation of section 302(c)(5) vitally concerns the Meat Cutters. The interpretation bars retired employees from participating as beneficiaries of a jointly administered health and welfare fund. It bars union officers and employees from participating as beneficiaries of either a jointly administered health and welfare fund or a pension fund. As to them the bar is total.

The interpretation is in conflict with the premise upon which local unions of the Meat Cutters have negotiated jointly administered plans throughout the United States. In preparation for the appeal in *Blassie* v. *Kroger Co.*, 59 LRRM 2034 (C.A. 8, April 23, 1965), in which the Court of Appeals for the Eighth Circuit adopted an interpretation contrary to that of the District Court in this case, the Research Department of the Meat Cutters in May 1964 concluded a study to determine the incidence of coverage of retired employees and union officers and employees by jointly administered plans set up pursuant to collective bargaining agreements with Meat Cutters local unions. The study disclosed that, of 110 health and welfare plans, coverage of retired employees is provided in 53 (48 percent), and coverage of union officers and employees is provided in 99 (90 percent). Furthermore, of 69 pension

plans, coverage of union officers and employees is provided in 53 (77 percent).

The coverage of retired employees by jointly administered plans negotiated by Meat Cutters local unions epitomizes the general extension under collective bargaining of health and welfare benefits to retired employees (*infra*, pp. 13-18). The same is true of union officers and employees. While we have been unable to find any published statistics, the incidence of coverage disclosed by the Meat Cutters' study confirms the informed consensus that coverage under a jointly administered trust fund of the employees and officers of the contracting union is widespread. This extensive coverage of course reflects the general understanding that it is legal to include retired employees and union officers and employees as beneficiaries of a jointly administered trust fund. Indeed, until the decision of the District Court for the Eastern District of Missouri in January 1964 in *Kroger Co.* v. *Blassie,* 225 F. Supp. 300, since reversed by the Court of Appeals for the Eighth Circuit (*Blassie* v. *Kroger Co.,* 59 LRRM 2034, April 23, 1965), there had been no hint of illegality in such coverage during the sixteen and one-half years since the enactment of section 302 in 1947.[4] Based on the prevailing belief that it is lawful to extend pension, health, and welfare benefits to retired employees and union officers and employees via the medium of participation in jointly administered plans, compensation for work has been predicated in part upon the ultimate receipt of such benefits as a constituent of the consideration due, significant sums of money have been collected and invested to provide the

[4] For example, coverage of union officers and employees appears on the face of the opinion in *Sanders* v. *Birthright*, 172 F. Supp. 895, 899 (S.D. Ind.), with no intimation of illegality. Aside from the instant decision and the reversed decision in *Kroger Co.* v. *Blassie,* a third like decision was rendered in *United States Trucking Corp.* v. *Strong,* 239 F. Supp. 937 (S.D.N.Y.), presently on appeal to the Court of Appeals for the Second Circuit, No. 29,656. These decisions mushroomed since the January 1964 decision in *Kroger Co.* v. *Blassie,* after a preceding period of total quiescence.

promised protection, and important expectations of financial security during illness and old-age have been created in reliance on it. Safeguarding these interests from the latter-day notion that they have been built on an illegal base is the concern of amicus.

SUMMARY OF ARGUMENT

I

The extension of health and welfare benefits to retired employees is an important and growing part of the protection which the worker enjoys under collective bargaining. There is not the least doubt that no legal impediment exists to a negotiated plan extending health benefits to retired employees which is administered solely by the employer. The question reduces simply to whether it makes a difference that the plan is jointly administered. It would be wholly quixotic to say that the worker who during his active years received health benefits under a negotiated plan administered by the employer alone may continue to enjoy the benefits after his retirement but that the same employee receiving identical health benefits under a negotiated plan which happens to be jointly administered must be cut off at retirement. Whether Congress drew so bizarre a line is the question at issue.

Nothing in the words that Congress used supports such an incongruity. On the contrary, the text of section 302(c)(5) obviously contemplates that the benefits it allows may be extended to the worker after the termination of his status as an active employee. By the nature of the benefit this is necessarily true of "pensions on retirement," "unemployment benefits," and "severance or similar benefits," and there is not the least reason why it should not also be true of the coequal benefits of "medical or hospital care," "life insurance, disability and sickness insurance, or accident insurance."

Nor is there anything in the history or purpose of section 302(c)(5) which supports denial of health benefits to retired employees under a jointly administered plan. Three elements enter into the design of the section: (1) concern that a trust fund shall not be diverted from health and welfare purposes to unrelated ends, a mischief overcome by specifying that the trust shall be confined to specific health and welfare objects and shall be under joint employer-union administration; (2) within the health and welfare area the trust fund shall be allowed full range to serve health and welfare purposes; and (3) the limitation of the trust fund to the "sole and exclusive benefit of the employees" and the requirement of separate maintenance of a pension fund trace to the Internal Revenue Code and are designed simply to assure that the employer's contribution shall be a deductible business expense, the income of the trust fund shall be tax-exempt, and the employer's contribution shall not constitute income to the employee until he actually receives a benefit from the fund. Each of these three elements confirms the entire legality of giving health benefits to retired employees. Nothing in that benefit resembles or conduces to the mischief of the use of funds to perpetuate control of union officers, for political purposes, or for personal gain at which Congress aimed. It is, on the contrary, entirely within the area of health and welfare purposes which Congress did not trammel. And the payment of health benefits to retired employees is wholly within the tax consequences which Congress wished to assure. Indeed, the federal tax regulations, in effect at the enactment of section 302 as now, confer tax-exempt status on plans which cover "former employees" (*infra*, pp. 31-35).

The history of congressional action since the enactment of section 302 further confirms the permissibility of extending health benefits to retired employees. In 1959, Congress amended the section to add that a jointly administered trust fund could be established "for the purpose of pooled

vacation, holiday, severance or similar benefits, or defraying costs of apprenticeship or other training programs." It is to the last degree unimaginable that, in the face of this explicit expansion to remove doubt as to the legality of these purposes, Congress thought that it had in 1947 enacted, or in 1959 would have continued, a prohibition against health benefits for retired employees. And other federal enactments adopted in 1959, 1960, and 1962 dealing with health benefits for the retired employee show the solicitude of Congress for him and the untenability of imputing to Congress any intention that section 302 shall preclude the grant of health benefits to him.

II

Section 302(c)(5) does not bar participation by employees and officers of the contracting union as beneficiaries of a jointly administered trust fund. The union is of course a distinct entity with the status of an employer vis-a-vis its own employees. This conclusion is indeed compelled by satutory definition. And section 302(c)(5) explicitly states that different employers may contribute to a single trust fund. As a separate and distinct employer, the union is part of the class of "employers" who, in the words of section 302(c)(5), may make "similar payments" for their employees who participate "jointly" as beneficiaries.

The participation of union employees and officers in the fund as beneficiaries conduces to no evil at which section 302(c)(5) is aimed. There is no risk in their coverage which does not inhere in the coverage of any group of employees. "We see no particularized danger of abuse. Payments are made to a jointly administered fund. There is present only the same possibility of abuse which is at hand when any trustee or group of trustees chooses to be dishonest." *Blassie* v. *Kroger Co.*, 59 LRRM 2034, 2043-44 (C.A. 8, April 23, 1965). It would be a wholly unnatural state of affairs, and therefore is a wholly

artificial reading of the statute, to exclude from the benefits of the fund the employees and officers of the contracting union who serve the interests of all the employees and should therefore be expected to share the same employment benefits with them. Indeed, under the terms of the Internal Revenue Code, to which the words of section 302(c)(5) directly trace, officers are explicitly enumerated as eligible to participate as beneficiaries of a trust fund.

Of course the union may have no voice in choosing the employer representatives on the fund. For while the union is an employer vis-a-vis its own employees, it is also an employee representative, and in view of its dominating characteristic as an employee representative it would do violence to the principal of equal representation were it to share in the selection of the employer representatives. The union's dual role requires its nonparticipation in choosing the employer representatives but does not require debarment of its employees from coverage as fund beneficiaries.

No other precluding considerations exist. It is wholly irrelevant that particular union officers, by virtue of their high rank and consequent managerial status, may not combine to bargain collectively with the union through a bargaining representative of their own choice. "The right collectively to bargain is an entirely different question." *Blassie* v. *Kroger Co.*, 59 LRRM 2034, 2045 (C.A. 8, April 23, 1965). Nor is there the slightest basis for supposing that the union, in participating in the jointly administered fund in its capacity as an employer of its own employees, would have a conflict of interest in discharging its function as an employee representative. That "remote possibility" is too minimal and tangential to be persuasive; it "does not fall into that category of mischiefs which the legislative history reveals to be the target of the statute." *Id.* at 2044-45.

ARGUMENT

Section 302 of the Labor Management Relations Act, 1947, Does Not Bar Retired Employees From Participating As Beneficiaries of the Medical-Hospitalization Trust Fund and Union Officers and Employees From Participating As Beneficiaries of the Medical-Hospitalization Trust Fund and the Pension Fund

Section 302 of the Labor Management Relations Act, 1947, governs the question whether retired employees are statutorily barred from receiving health and welfare benefits from a jointly administered health and welfare fund, and whether union officers and employees are statutorily barred from receiving pension, health, or welfare benefits from a jointly administered but separately established health and welfare fund and pension fund. Section 302(a) is a general prohibition against an employer giving any money or other thing of value to a union or its representatives and section 302 (b) prohibits any person from receiving a payment prohibited by (a).[5] Section 302 (c) contains six

[5] Sec. 302. (a) It shall be unlawful for any employer or association of employers or any person who acts as a labor relations expert, adviser, or consultant to an employer or who acts in the interest of an employer to pay, lend, or deliver, or agree to pay, lend, or deliver, any money or other thing of value—

(1) to any representative of any of his employees who are employed in an industry affecting commerce; or

(2) to any labor organization, or any officer or employee thereof which represents, seeks to represent, or would admit to membership, any of the employees of such employer who are employed in an industry affecting commerce; or

(3) to any employee or group or committee of employees of such employer employed in an industry affecting commerce in excess of their normal compensation for the purpose of causing such employee or group or committee directly or indirectly to influence any other employees in the exercise of the right to organize and bargain collectively through representatives of their own choosing; or

(4) to any officer or employee of a labor organization engaged in an industry affecting commerce with intent to influence him in respect to any of his actions, decisions, or duties as a representative of employees or as such officer or employee of such labor organization.

(b)(1) It shall be unlawful for any person to request, demand, receive, or accept, or agree to receive or accept, any payment, loan, or delivery of any money or other thing of value prohibited by subsection (a).

exceptions to the ban, of which exceptions (5) and (6) are presently relevant. Exception (5) provides that the prohibition "shall not be applicable":

> (5) with respect to money or other things of value paid to a trust fund established by such representative, for the sole and exclusive benefit of the employees of such employer, and their families and dependents (or of such employees, families, and dependents jointly with the employees of other employers making similar payments and their families and dependents):

Three qualifications, (A), (B), and (C), are placed upon this exception. Qualification (A) states that:

> (A) such payments are held in trust for the purpose of paying, either from principal or income or both, for the benefit of employees, their families and dependents, for medical or hospital care, pensions on retirement or death of employees, compensation for injuries or illness resulting from occupational activity or insurance to provide any of the foregoing, or unemployment benefits or life insurance, disability and sickness insurance, or accident insurance:

Qualification (B) states that:

> (B) the detailed basis on which such payments are to be made is specified in a written agreement with the employer, and employees and employers are equally represented in the administration of such fund, together with such neutral persons as the representatives of the employers and the representatives of employees may agree upon and in the event the employer and employee groups deadlock on the administration of such fund and there are no neutral persons empowered to break such deadlock, such agreement provides that the two groups shall agree on an impartial umpire to decide such dispute, or in event of their failure to agree within a reasonable length of time, an impartial umpire to decide such dispute shall, on petition of either group, be appointed by the district court of the United States for the district where the trust fund has its principal office, and shall also contain provisions for an annual audit of the trust fund, a statement of the results of which shall be available for

> inspection by interested persons at the principal office of the trust fund and at such other places as may be designated in such written agreement;

Qualification (C) states that:

> (C) such payments as are intended to be used for the purpose of providing pensions or annuities for employees are made to a separate trust which provides that the funds held therein cannot be used for any purpose other than paying such pensions or annuities;

Finally, subject to the applicability of qualification (B), exception (6) authorizes an employer to contribute to a trust fund "for the purpose of pooled vacation, holiday, severance or similar benefits, or defraying costs of apprenticeship or other training programs."

I. SECTION 302(c)(5) OF THE LABOR MANAGEMENT RELATIONS ACT, 1947, DOES NOT BAR AN ACTIVE EMPLOYEE UPON HIS RETIREMENT FROM CONTINUING AS THE BENEFICIARY OF A JOINTLY ADMINISTERED HEALTH AND WELFARE PLAN.

We shall show, as the Court of Appeals for the Eighth Circuit held, that "a person for whom employer contributions are made prior to retirement is not barred from receiving benefits of the Trust after retirement, and that this qualification is not nullified by additional contributions made by him or by others in his behalf." *Blassie* v. *Kroger Co.*, 59 LRRM 2034, 2040, decided April 23, 1965.

A. The Extension of Health and Welfare Benefits to Retired Employees is an Important and Growing Part of the Protection Which the Workers Enjoy Under Collective Bargaining.

"A statute, like other living organisms, derives significance and sustenance from its environment, from which it cannot be severed without being mutilated."[6] Hence, in-

[6] Mr. Justice Frankfurter dissenting in *United States* v. *Monia*, 317 U.S. 424, 432.

dispensable to consideration of the legal question whether under section 302 (c)(5) of the Labor Management Relations Act, 1947, an active employee upon his retirement may continue as the beneficiary of a jointly administered health and welfare plan is knowledge of the environment in which the question exists and therefore the probable attitude of Congress to it. In a nutshell the extension of health and welfare benefits to retired employees is an important and growing part of the protection which the worker enjoys under collective bargaining. It gives to him in his twilight years when the need is greatest the means of meeting the expenses of illness.

"The trend of welfare plans toward the inclusion of retired persons is a fact of today's industrial life. . . ." *Blassie* v. *Kroger Co.*, 59 LRRM 2034, 2041 (C.A. 8, April 23, 1965). The statistics tell the story. In 1960-1961 the Bureau of Labor Statistics published a four-part study entitled Health and Insurance Plans Under Collective Bargaining.[7] The representative character of the study was explained as follows:[8]

> The 300 health and insurance plans studied were selected to provide a broadly representative view of the type of protection provided by major plans under collective bargaining, i.e., those covering 1,000 or more workers. Factors given primary consideration in the selection of the sample were industry, geographic location, type of bargaining unit, and size of plan as measured by active worker coverage. The 300 selected plans, which ranged in coverage from 1,000 to a half million workers, provided health and insurance benefits to a

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[7] Generally entitled Health and Insurance Plans Under Collective Bargaining, the study is divided into Hospital Benefits, Early 1959, B.L.S. Bull. No. 1274, U.S. Dep't. Lab. (March 1960); Surgical and Medical Benefits, Late Summer 1959, B.L.S. Bull. No. 1280, U.S. Dep't. Lab. (November 1960); Major Medical Expense Benefits, Fall 1960, B.L.S. Bull. No. 1293, U.S. Dep't. Lab. (May 1961); Life Insurance and Accidental Death and Dismemberment Benefits, Early Summer 1960, B.L.S. Bull. No. 1296, U.S. Dep't. Lab. (June 1961).

[8] Bull. No. 1274, *op. cit. supra*, n. 7, at 2-3.

> total of 4.9 million workers . . ., or about 40 percent of the estimated number of workers under all health and insurance plans under collective bargaining agreements. . . .
>
> Virtually every major manufacturing and non-manufacturing industry was represented in the sample studied. . . . Almost 3 out of 4 plans (219), covering two-thirds of the workers, were in manufacturing industries. Nearly a third of the plans (95), covering more than 40 percent of the workers, were negotiated by multiemployer groups.

The study divided the available health and welfare benefits into four classes: hospital benefits, surgical and medical benefits, life insurance and accidental death and dismemberment benefits, and major medical expense benefits. "All but two plans provided hospital benefits." [9] The extension of hospital benefits to retired employees has rapidly expanded. Thus, "coverage of retired workers and their dependents rose from about 20 percent of the plans in 1955 to almost 40 percent in 1959. . . ." [10] "Retired workers and their dependents were provided benefits under almost two out of five of the plans with benefits for the active workers and their dependents, respectively . . .—a sharp increase over 1955 when only one out of four plans extended benefits to retired workers and one out of five extended them to retired workers' dependents." [11]

The story as to surgical and medical benefits is much the same. "Of the 300 plans studied, surgical benefits were provided active workers and their dependents by 293 and 282 plans, respectively. . . . Retired workers and their dependents received surgical benefits under 103 and 100 plans, respectively, covering about 40 percent of all workers in the 300 plans studied. . . . Medical benefits were provided by 7

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[9] Bull. No. 1274, *op. cit. supra*, n. 7, at 4.

[10] *Ibid.*

[11] *Id.* at 25.

out of 10 of the plans studied (213). . . . Retired workers and their dependents received medical benefits under 74 and 71 plans, respectively, covering over 30 percent of the workers in the sample.'' [12] Here too the keynote is expanding coverage. ''Since 1955, the number of plans providing surgical coverage for retired workers increased from 19 percent of all plans studied to 34 percent, and coverage for their dependents rose from 16 percent to 33 percent of the plans. . . . Coverage of retired workers by medical benefits increased from 12 percent to 25 percent of the plans studied and for their dependents, from 10 percent to 24 percent.'' [13]

Although the pattern is more checkered, the story of significant and expanding coverage prevails as well with respect to life insurance and accidental death and dismemberment benefits. ''Life insurance was provided active workers by 295 of the 300 plans studied. . . . This benefit was extended to retired workers by almost 2 out of 3 of these plans (189) representing the same proportion of the workers in the sample. . . . Accidental death and dismemberment benefits were included in somewhat more than half of the 300 plans studied (162), covering less than half of the workers (47 percent). . . . In contrast with the extension of life insurance, less than 5 percent of these plans provided benefits for retired workers, and no plan had such coverage for dependents.'' [14] While life insurance benefits for active workers and their dependents has remained about the same, ''coverage of retired workers increased from 49 percent of the plans in 1955 to 63 percent in 1960. During the same period, there was little change in accidental death and dismemberment benefit coverage of both active and retired workers.'' [15]

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[12] Bull. No. 1280, *op. cit. supra*, n. 7, at 2-3.

[13] *Id.* at 6.

[14] Bull. No. 1296, *op. cit. supra*, n. 7, at 2-3.

[15] *Id.* at 3.

Major medical expense benefits—otherwise known as catastrophic illness insurance—is the final class. "Of the 300 health and insurance plans under collective bargaining studied, 43, covering about 1,200,000 workers, provided major medical benefits for active workers. . . . Dependents of active workers were covered by 39 plans. Nine plans continued coverage for retired workers and eight for their dependents."[16]

In negotiating health and welfare benefits for retired employees, coverage is very often extended to the worker who has already retired as well as to the worker to be retired. "When 112 major collectively bargained health and insurance plans made provision for the extension of health benefits to workers upon retirement, two-thirds (76) also extended coverage to employees who had already retired. In virtually every such instance, prior pensioners were to receive the same benefits and make the same contributions, if any, as future pensioners. The cost of the pensioners' benefits was to be paid by the employers in nearly half the plans, and by both groups in all but one of the remaining plans. All but 2 of the 76 plans providing for the coverage of prior pensioners extended health benefits to them at the same time as to future pensioners."[17]

This important and expanding extension of health and welfare benefits to the retired employee is the consequence of "the growing recognition of the health needs of retired workers on the part of employers and unions."[18] It is "a

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[16] Bull. No. 1293, *op. cit. supra.* n. 7, at 5.

[17] Landay, *Extension of Health Benefits to Prior Pensioners,* 83 Monthly Lab. Rev. 841 (August 1960).

[18] Spiegelman, Ensuring Medical Care for the Aged, 213 (1960). See also, Health Benefit Plans Under Collective Bargaining, U.S. Dept. Health, Ed. and Lab., Soc. Sec. Admin., Div. Research and Statistics, Research and Statistics Note No. 1, February 13, 1964; Kittner, *Recent Changes in Negotiated Health and Insurance Plans,* 85 Monthly Lab. Rev. 1015 (Sept. 1962). And see, Shaffer, Health Care Plans and Medical Practice, Editorial Research Reports, June 20, 1962; Medical Care for the Aged, Congressional Quarterly Service, Special Report, August, 1963.

significant indication of the real drive that industry, labor, and many carriers are making to meet the problem.''[19] There is not the least doubt that the social good is entirely served by provision for health benefits for the senior citizen through the private effort of management and labor. There is similarly not the least doubt that no legal impediment exists to a negotiated plan extending health benefits to retired employees which is administered solely by the employer. The question reduces therefore to whether it makes a difference that the plan is jointly administered. Manifestly the social good is identical and the need of the retired employee the same whether the administration of the plan is single or joint. Nor is there anything in the difference between single and joint administration which is germane to the extension of health benefits to the retired employee. It would be wholly quixotic to say that the worker who during his active years received health benefits under a negotiated plan administered by the employer alone may continue to enjoy the benefits after his retirement but that the same employee receiving identical health benefits under a negotiated plan which happens to be jointly administered must be cut off at retirement. Whether Congress drew so bizarre a line is the question at issue.

B. The Text of Section 302(c)(5) Validates the Extension of Health Benefits to Retired Employees.

Section 302(c)(5) permits the establishment of a trust fund ''for the sole and exclusive benefit of *employees* of such employer . . .'' (emphasis supplied). The Court of Appeals for the Eighth Circuit construed the term ''employees'' ''to mean covered current employees and persons who were covered current employees but are now retired. This is not non-literal construction but one which, we think, comports with the ordinary and literal meaning of the term.'' *Blassie* v. *Kroger Co.*, 59 LRRM 2034, 2042 (C.A. 8, April 23, 1965). The Eighth Circuit thus rejected the

[19] Somers and Somers, Doctors, Patients, Health Insurance, 434 (1961).

view of the District Court in that case that "Retired personnel are not *employees* of the contributing employers and cannot legally be included as beneficiaries under" the trust. *Kroger Co.* v. *Blassie,* 225 F. Supp. 300, 307-308 (E.D. Mo.) (emphasis in original). This Court should similarly reject the identical view of the District Court in this case that retired "persons are no longer employees" (58 LRRM at 2692).

The restricted reading of the term "employees" does not survive an examination of the text of the section as a whole. The premise of the reading is that the word "employee" must mean a worker who occupies active status. This premise is irreconcilable with the permitted benefits explicitly enumerated by the section for which the "employees" are eligible. These include "pensions on retirement," "unemployment benefits," and "severance or similar benefits." Each benefit contemplates cessation of active status by the employee. A pension is payable precisely because the employee has retired; an unemployment benefit is payable precisely because the employee is no longer working; a severance benefit is payable precisely because the employee's status with his employer has terminated. Thus the "statute by its very language obviously contemplates the enjoyment of certain benefits after an employee's retirement or while he is inactive." *Blassie* v. *Kroger Co.*, 59 LRRM 2034, 2041 (C.A. 8, April 23, 1965). It is evident, therefore, that a contribution to a trust fund does not cease to be "for the sole and exclusive benefit of the employees" simply because the benefit inures to the employee after termination of his active status. And since that is true of "pensions on retirement," "unemployment benefits," and "severance or similar benefits," there is not the least reason why it should not also be true of "medical or hospital care," "life insurance, disability and sickness insurance, or accident insurance." The retired employee who needs a pension to provide food, clothing and shelter also needs the wherewithal to prevent and cure

illness. Nothing in the words Congress used supports an invidious choice by it between the two needs.

Nor can textual support for the restricted reading of the term "employees" be drawn from subpart (C) of section 302(c)(5). That subpart states, as a requirement pertinent to pensions, that "such payments as are intended to be used for the purpose of providing pensions or annuities for employees are made to a separate trust which provides that the funds held therein cannot be used for any purpose other than paying such pensions or annuities." Based on the requirement of the separateness of a pension fund the inference is drawn that a welfare fund is prohibited from conferring health benefits on retired employees. *Kroger Co.* v. *Blassie*, 225 F. Supp. 300, 307 (E.D. Mo.). That inference, observed the Court of Appeals for the Eighth Circuit in reversing, is not "apparent to us." *Blassie* v. *Kroger Co.*, 59 LRRM 2034, 2041 (C.A. 8, April 23, 1965). All that the prohibition against commingling can mean is that a pension trust and a welfare trust shall be set up separately. It does not mean that, given a welfare fund separately established from a pension fund, the welfare fund is forbidden to grant health benefits to retired employees. On the contrary, the requirement of separateness has no relevance at all to support disentitlement of a retired employee from receiving health benefits from a distinct and segregated welfare trust.

Thus, the text does not support, and the legislative history, to which we now turn, refutes the notion that a retired employee is ineligible to receive health benefits from a jointly administered welfare trust. And salutary in resolving any doubt is the preference expressed by the Eighth Circuit for "a construction policy favoring inclusion and benefits where there is no statutory language or inference of exclusion, rather than one favoring exclusion and a denial of benefits where there is no positive language of inclusion." *Blassie* v. *Kroger Co., supra*, 59 LRRM at

2040. The District Court's observation in this case that an exception to a general prohibition should be narrowly construed (58 LRRM at 2692) "need not detain us; insights derived from syntactical analysis form a hazardous basis for the explication of major legislative enactments." *Local Lodge No. 1424, Machinists* v. *N.L.R.B.*, 362 U.S. 411, 417, n. 7.

C. The Legislative History of Section 302(c)(5) Supports the Extension of Health Benefits to Retired Employees.

Three elements emerge from the legislative history: (1) concern that a trust fund shall not be diverted from health and welfare purposes to unrelated ends, a mischief overcome by specifying that the trust shall be confined to specific health and welfare objects and shall be under joint employer-union administration; (2) within the health and welfare area the trust fund shall be allowed full range to serve health and welfare purposes; and (3) the limitation of the trust fund to the "sole and exclusive benefit of the employees" and the requirement of separate maintenance of a pension fund trace to the Internal Revenue Code and are designed simply to assure that the employer's contribution shall be a deductible business expense, the income of the trust fund shall be tax-exempt, and the employer's contribution shall not constitute income to the employee until he actually receives a benefit from the fund. Each of these three elements confirms the entire legality of giving health benefits to retired employees. Nothing in that benefit resembles or conduces to the mischief at which Congress aimed. It is, on the contrary, entirely within the area of health and welfare purposes which Congress did not trammel. And the payment of health benefits to retired employees is wholly within the tax consequences which Congress wished to assure.

1. *The general background:* The regulation of trust funds via section 302(c)(5) of the Labor Management Relations Act, 1947, was enacted in 1947 "as part of a compre-

hensive revision of federal labor policy in the light of experience acquired during the years following passage of the Wagner Act, and was aimed at practices which Congress considered inimical to the integrity of the collective bargaining process.''[20] The trust fund subject had first been importantly explored in 1946 when, during deliberation on the Senate floor of the Case bill[21] which was the precursor to the Taft-Hartley Act passed in 1947, Senator Byrd proposed an amendment which would prohibit payment by an employer and conversely receipt by a representative of employees of money or other thing of value.[22] During congressional consideration of trust fund regulation prominent reference was made to two papers published in the Monthly Labor Review, one in 1945[23] and one in 1947,[24] which provided the legislators with their factual frame of reference.[25] These showed that negotiated plans were rare until the advent of the national wage stabilization policy during World War II encouraged improvements in employment conditions through health and welfare benefits in lieu of wage increases during this period. In 1945, some 600,000 workers were included under such plans; by early 1947 about 1,250,000 were covered. The plans ranged widely. Cash benefits were provided to help defray the cost of sickness and accidents, including maternity incapacity, hospital expenditures, surgical costs, death, and dismemberment. Life insurance and pensions were

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20 *Arroyo* v. *United States*, 359 U.S. 419, 425.

21 H.R. 4908, 79th Cong., 2d Sess.

22 92 Cong. Rec. 4809.

23 Health-Benefit Programs Established Through Collective Bargaining, B.L.S. Bull. No. 841, 61 Monthly Lab. Rev. 191 (August 1945). See also, Baker and Dahl, Group Health Insurance and Sickness Benefit Plans in Collective Bargaining (1945), summarized in 17 LRRM 2521.

24 Union Health and Welfare Plans, 64 Monthly Lab. Rev. 191 (February 1947).

25 92 Cong. Rec. 4892, 5264, 5333, 5338; 93 Cong. Rec. 4037, 4747, 4748, 4752; S. Min. Rep. No. 105, 80th Cong., 1st Sess., 24.

afforded. Benefits were extended to laid-off employees. Health centers were established to provide medical care. And while the fact is not mentioned in the papers, plans negotiated with affiliates of the International Ladies Garment Workers Union granted benefits to retired employees.[26]

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[26] This statement is based on a memorandum received from the ILGWU dated March 31, 1964, which reads as follows:

> We are advised that a recent court decision holds that a Health and Welfare Fund may only make payments to, or on behalf of employees—not retirees or former employees.
>
> From the inception of the ILGWU Death Benefit Fund in 1937 to 1947 the death benefit was $150. Regular workers paid $1 a year for such coverage. Those who retired from the trade and continued to receive death benefit coverage paid $2 a year for the same coverage. (Those not working in the trade are deemed, as a group, a higher risk).
>
> As of July 1, 1947 the death benefit coverage was increased to $500 with those working in the trade still paying $1 a year with a Health and Welfare Fund paying an additional $3 a year for the extra coverage. Such payments were made for death benefit coverage retroactive to Jan. 1, 1947. Those retired from the trade were required to pay $4 a year for $500 coverage.
>
> In 1950 the maximum death benefit coverage was raised to $1000. Those working in the trade still paid $1 a year supplemented by a $7 annual payment by a Health and Welfare Fund. Members retired from the trade were required to pay $8 a year for the same $500 coverage.
>
> The right of members not working in the trade, more particularly retirees of industry retirement funds, to death benefit coverage developed out of, and was a continuation of, their previous coverage as workers in the trade whose death benefit payment was supplemented by payments from the Health and Welfare Fund.
>
> The ILGWU Death Benefit Fund has paid death benefits of $150 and of $500 to members retired from the trade prior to as well as after Jan. 1, 1947.
>
> One who retires from the trade and is eligible to continue death benefit coverage is known as a ''continuing member'' after withdrawal. (Art. 13, Sec. 13a of ILWGU Constitution). This emphasizes the continuity of death benefit coverage first, as a worker in the trade and, later, as one who has retired from the trade.
>
> In addition to continued death benefit coverage retired members also receive the privilege of continued treatment, as required, at the Union Health Center. Payments for such medical services were made by the Health and Welfare Fund before as well as after Jan. 1, 1947.
>
> It is presumed that legislation that became effective in Sept. 1947 was drafted with knowledge of the existence of the practice of providing retired workers with continued medical as well as death benefit protection.

2. *Health benefits on retirement not within the evil at which Congress aimed:* It was not the establishment of trust funds to confer health and welfare benefits, but rather concern that the funds might be diverted to unrelated purposes, which was the reason that Congress undertook to regulate them. The immediate impetus to legislative action was the demand by the United Mine Workers in 1946 for the creation of a welfare fund under the exclusive control of the union.[27] Congress feared "the possible abuse by union officers of the power which they might achieve if welfare funds were left to their sole control"; it was apprehensive that "such funds might be employed to perpetuate control of union officers, for political purposes, or even for personal gain."[28] To overcome this evil Congress defined the purposes for which the fund could be established, required that the benefits payable be specified in detail in the trust agreement, and prescribed joint union-employer administration of the fund.[29]

It is manifest that conferment of health benefits upon retired employees is "not an evil at which the statute is directed." *Blassie* v. *Kroger Co.*, 59 LRRM 2034, 2041 (C.A. 8, April 23, 1965). It is surely not the employment of trust funds "to perpetuate control of union officers, for political purposes, or . . . for personal gain." It does not make labor unions "so powerful that no organized government would be able to deal with them";[30] it is no grant of "tribute" to the union;[31] it is not "used for political or other purposes,"[32] or for "aggrandizement";[33]

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[27] *United States* v. *Ryan*, 350 U.S. 299, 304-305; *Arroyo* v. *United States*, 359 U.S. 419, 426.

[28] *Arroyo* v. *United States*, 359 U.S. 419, 426.

[29] 92 Cong. Rec. 4892-4894, 4899, 4900, 5064, 5180, 5338, 5339, 5346, 5494, 5930; S. Rep. No. 105, 80th Cong., 1st Sess., 52 (Supplemental Views); 93 Cong. Rec. 4678, 4746-48, 4752-4753.

[30] 92 Coug. Rec. 4892, 4893.

[31] 92 Cong. Rec. 4893, 4894.

[32] 92 Cong. Rec. 4899.

[33] 92 Cong. Rec. 5180, 5181.

it is not a benefit classifiable as "covering every field . . .—housing, welfare, education, anything the union may decide it wants to spend the money for";[34] it is not within the area of "housing, or education, or government";[35] it does not "divert funds . . . to the union treasury or the union officers";[36] it is not "subject to racketeering or arbitrary dispensation by union officers";[37] it does not "become a mere tool to increase the power of the union leaders over their men,"[38] or a "war chest for the particular union."[39] In short, health benefits for retired employees present no danger that they "will be used for the personal gain of union leaders, or for political purposes, or other purposes not contemplated when they were established, and that they will in fact become rackets."[40] The intrinsic character of health benefits is identical whether the recipient is an active or a retired employee. Like other benefits which are concededly permissible, so with health benefits for retired employees, joint administration exists as the safeguard erected to protect against diversion from authorzied purposes. And so, as legislation " 'must be read in the light of the mischief to be corrected and the end to be attained' " (*N.L.R.B.* v. *Hearst Publications*, 322 U.S. 111, 124), the statute cannot be construed to condemn health benefits for retired employees, a beneficence altogether outside the evil at which Congress aimed.

3. *Health benefits on retirement part of the positive good that Congress served:* It is not simply that health benefits

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[34] 92 Cong. Rec. 5338.

[35] 92 Cong. Rec. 5494.

[36] S. Rep. No. 105, 80th Cong., 1st Sess., 52 (Supplemental Views).

[37] *Ibid.*

[38] *Ibid.*

[39] 93 Cong. Rec. 4747.

[40] 93 Cong. Rec. 4678.

for retired employees are not within the mischief that Congress sought to control. They are, more than that, part of the positive good which Congress sought affirmatively to serve. "The statute . . . speaks broadly of benefits. It specifies benefits for medical or hospital care, and for injuries or illness, and for disability and sickness, and for accident. Misfortune of this kind is not confined to the active employee. It strikes the retired one as well and, because of his age, with greater frequency." *Blassie* v. *Kroger Co.*, 59 LRRM 2034, 2041 (C.A. 8, April 23, 1965). "It is a commonplace of modern industrial relations for employers to provide security for employees and their families to meet problems arising from unemployment, illness, old age or death."[41] Congress favored the well-rounded realization of this commonplace and was careful to explain that it placed no unjust impediments in the way of creation of trust funds to further the development of health and welfare objectives.

Trust fund regulation was initiated by an amendment proposed by Senator Byrd, and he repeatedly emphasized that "I am not objecting to the establishment of health and welfare funds for workers; I am in favor of it";[42] "It would still be possible to establish a health program and place the money under joint control";[43] "it does not in any way prohibit the establishment of a health fund, if it should be controlled by mutual agreement, and not go directly to the union."[44] Senator Byrd reiterated that:[45]

> The purpose is to make sure that the prohibitions contained in my amendment do *not* apply to the payment of any money or other thing of value to an organ-

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[41] *Lewis* v. *Benedict Coal Corp.*, 361 U.S. 459, 468.

[42] 92 Cong Rec. 4892.

[43] 92 Cong. Rec. 4893.

[44] 92 Cong. Rec. 4894.

[45] 92 Cong. Rec. 5040.

> ization or fund *for furnishing health, welfare or other benefits* if employers and employees are both represented in the administration of such organization or fund. . . .[Emphasis supplied.]

As expressed by Senators Morse and Stanfill, any objection to "a health and welfare fund" would be removed by joint administration.[46] Granted joint administration, Senator Overton explained, "There is nothing . . . in the amendment that inhibits the establishment of health and hygienic programs, welfare programs, recreational programs or other programs beneficial to labor."[47]

Senator Taft was the principal architect of the Labor Management Relations Act, 1947. He stated that "the Byrd amendment is a very reasonable one. I do not see any objection to it. I do not consider that it will stand in the way of the establishment of *any reasonable* health fund which the union may wish to establish."[48] Referring to existing funds, he observed that "every fund that is mentioned in the particular pamphlet . . . is authorized by the amendment, as changed, with the exception of the single question of the administration of the fund."[49] "We have a very detailed knowledge of these different funds, and I feel quite confident that the language of the amendment is broad enough to cover every fund in existence."[50] The gamut of existing funds, Senator Taft explained, did not exhaust but simply illustrated the range of permitted benefits:[51]

> It seems to me the main point is that there should be a definition, and the definition contained in section 3(a) is *broad enough to cover every existing fund and*

46 92 Cong. Rec. 5064.

47 92 Cong. Rec. 5180.

48 92 Cong. Rec. 5338 (emphasis supplied).

49 *Ibid.*

50 92 Cong. Rec. 5339.

51 92 Cong. Rec. 5338.

> *would justify the setting up by the coal miners of a more extensive fund*, if they wished, than that set up under the existing plan described in the amendment. [Emphasis supplied.]

There is no objection to "a fund for health purposes clearly outlined in a collective-bargaining agreement. . . . The Byrd amendment carefully defines the recognized forms of health and welfare benefits which such funds have been used for, and which have been legislated about in the Internal Revenue Code, which are found to be funds for beneficial purposes, which should receive special tax exemption, and should have special consideration from the Government."[52]

Congressman Case observed that "the purposes of the fund are quite broad and the fund may be used for accident insurance, compensation for death or disability, *or anything of that sort.* Therefore, the Byrd amendment does not prevent a welfare fund but legalizes it and provides for joint management on the part of those who contribute to it."[53]

The theme thus sounded in 1946 was the unchanged motif which prevailed in 1947. Senators Taft, Ball, Donnell, Jenner, and Smith stated that:[54]

> It does not prohibit welfare funds but merely requires that, if agreed upon, such funds be jointly administered —be, in fact, trust funds for the employees, with definite benefits specified, to which employees are clearly entitled, and to obtain which they have a clear legal remedy.

The permitted purposes, Senator Taft repeated, cover "all the welfare purposes which are contained in any of the existing welfare funds now established in a certain number

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[52] 92 Cong. Rec. 5494.

[53] 92 Cong. Rec. 5930 (emphasis supplied).

[54] S. Rep. No. 105, 80th Cong., 1st Sess., 52 (Supplemental Views).

of industries.''[55] All that is requisite is joint administration and specification of health and welfare purposes ''—so much to provide health benefits, so much for this kind of hospital service, so much for this kind of insurance.''[56] Funds may be freely established to furnish ''definite services which are recognized as proper services for welfare funds.''[57]

The upshot is clear. Congress drew no line between active and retired employees. It drew a line between health and welfare purposes and unrelated objectives. And within the health and welfare area it allowed full range. Since, in this case, the health benefits conferred are clearly within the authorized statutory purposes, and since no statutory distinction as to eligibility exists between retired and active employees, the legality of the conferment of health benefits upon retired employees is plain.

4. *The genesis in the Internal Revenue Code of the words ''for the sole and exclusive benefit of employees'' and of the requirement of separate maintenance of a pension fund:* It would be startling indeed if a benefit which is not within the evil at which Congress aimed, but is instead part of the positive good that Congress served, were nevertheless found to be prohibited by the words that Congress used. It is therefore not surprising to find that, in the light of the particularized history underlying the words chosen, they do not have the interdictory meaning ascribed to them. In the form in which it was finally enacted in 1947, section 302(c)(5) originated with an amendment introduced by Senator Ball on May 20, 1946.[58] It was this amendment which first used the words ''for the sole and exclusive

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[55] 93 Cong. Rec. 4746.

[56] 93 Cong. Rec. 4747.

[57] *Ibid.*

[58] 92 Cong. Rec. 5277.

benefit of the employees." This amendment also contained a subpart (C) providing, as a condition of legality, that:

> Such payments meet the requirements for deduction by the employer under section 23(a) or section 23(p) of the Internal Revenue Code.

The words "for the sole and exclusive benefit of the employees" are exactly those which were finally enacted in 1947. Subpart (C) in its original form disappeared; the Senate bill as passed in 1947 contained no counterpart; but in conference a new version appeared, described as one of a number of "clarifying changes," [59] which was enacted and provides that:

> such payments as are intended to be used for the purpose of providing pensions or annuities for employees are made to a separate fund which provides that the funds held therein cannot be used for any purpose other than paying such pensions or annuities.

These changes "tie in, not unexpectedly, with those provisions of the Internal Revenue Code exempting qualified pension and welfare trusts from income taxation." *Blassie v. Kroger Co.*, 59 LRRM 2034, 2041 (April 23, 1965). Thus, concerning his amendment introduced in 1946, referring to deductibility under sections 23(a) and 23(p) of the Internal Revenue Code, Senator Ball stated:[60]

> Those are highly technical sections as I understand. Frankly, I do not know all the details of them. They provide the conditions under which business may deduct payments into a pension or other benefit plan for employees, from income for tax purposes. Certainly we should not expect the employer to make a contribution to a trust fund for the benefit of employees, and then force the employer to pay income tax on the amount of the contribution.

Senator Taft stated that:[61]

> In the first place, what about the tax situation? Can an employer pay money into the air on which no one is

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[59] 93 Cong. Rec. 6445.

[60] 92 Cong. Rec. 5346.

[61] 92 Cong. Rec. 5338.

> ever going to pay any tax? That question has not been considered. I may say there are many employers' trusts, mostly pension funds and health benefit funds set up by the employers, and under Federal law, section 23(p) and section 165 of the Internal Revenue Code, we have regulated them in detail because we recognized that such things may be abused by the employers. In this case it is obvious that the particular kind of fund may be abused by the union.

He further stated that:[62]

> The Byrd amendment carefully defines the recognized forms of health and welfare benefits which such funds have been used for, and which have been legislated about in the Internal Revenue Code, which are found to be funds for beneficial purposes, which should receive special tax exemption, and should have special consideration from the Government. That is what the Byrd amendment does.

Tracing section 302(c)(5) to the Internal Revenue Code casts revealing light on its scope. The words "for the sole and exclusive benefit of the employees" derived from section 165 of the Internal Revenue Code.[63] That section conferred tax-exempt status upon a "trust forming part of a stock bonus, pension, or profit-sharing plan of an employer *for the exclusive benefit of his employees* or their beneficiaries . . ." (emphasis supplied). The then applicable federal tax regulation made clear that "employees" meant either "present employees only, or present *and former employees, or only former employees*":[64]

> § 29.23(p)-1 *Contributions of an employer to an employees' trust or annuity plan and compensation under a deferred payment plan; in general.* [Emphasis in original.] Section 23(p) prescribes limitations upon deductions for amounts contributed by an employer un-

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62 92 Cong. Rec. 5494.

63 26 U.S.C. § 165 (1946 ed.). All references, unless otherwise indicated, are to the Internal Revenue Code in effect in 1946.

64 Code of Federal Regulations, Cumulative Supplement, 1944, Title 26, Ch. I, § 29.23(p)-1 (emphasis supplied).

> der a pension, annuity, stock bonus, or profit sharing plan, or under any plan of deferred compensation. *It is immaterial whether the plan covers present employees only, or present and former employees, or only former employees.* Section 23(p) does not cover contributions which give the *employee or former employee* present benefits such as life insurance protection. The cost of such benefits in deductible to the extent allowable under this section 23(a). See § 29.165-6. [Emphasis supplied.]

Nor was the tax-exempt status of the pension fund affected by the coverage of former employees; as the federal tax regulations stated, "A plan is for the exclusive benefit of employees or their beneficiaries even though it may cover former employees as well as present employees and employees who are temporarily on leave, as, for example, in the military or naval forces."[65] Not only had the Internal Revenue Code "been administratively interpreted to include former employees" (*Blassie* v. *Kroger Co.*, 59 LRRM 2034, 2042 (C.A. 8, April 23, 1965)), bnt the federal tax regulations made clear that it is not at all the retired employee at which the requirement of the exclusivity of pension benefits for the employee is aimed:[66]

> If the plan is so designed as to amount to a subterfuge for the distribution of profits to shareholders, even if other employees who are not shareholders are included under the plan, it will not qualify as a plan for the exclusive benefit of employees. The plan must benefit the employees in general, although it need not provide benefits for all of the employees. Among the employees to be benefited may be persons who are officers and shareholders. However, a plan is not for the exclusive benefit of employees in general if it discriminates either in eligibility requirements, contributions, or benefits by any device whatever in favor of employees who are officers, shareholders, persons whose principal duties consist in supervising the work of other

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65 *Id.* § 29.165-1.

66 *Ibid.*

employees, or the highly compensated employees. See section 165(a)(3), (4), and (5).

Finally, since the tax-exempt status of a pension plan under section 165 of the Internal Revenue Code required that it be devoted solely to pension purposes, the necessary consequence was to compel separate maintenance of the pension trust. Accordingly, under the Code, a qualified pension trust was exempt from taxation (§ 165(a)); the distribution to the beneficiary was taxable only when he actually received it (§ 165(b)); and the employer's contribution to the pension fund was deductible as a business expense (§ 23(p)).

Thus, by the requirement of section 302(c)(5) of the Labor Relations Act, 1947, that a trust fund be established "for the sole and exclusive benefit of the employees" and that a pension fund be separately maintained, Congress guaranteed the maximum tax benefits available under the Internal Revenue Code. This special tax purpose also carried over to the health and welfare fund. The same tax advantage adhered to a health and welfare fund as to a pension fund. Tax-exempt status was conferred upon a health and welfare fund by section 101(16) of the Internal Revenue Code, which extended exemption to "Voluntary employees' beneficiary associations providing for the payment of life, sick, accident, or other benefits to the members of such association or their dependents. . . ."[67] The term "member" of itself precluded a distinction between active or retired employees since either would be a member. The employer's contribution to the health and welfare fund was deductible as an "ordinary and necessary" business expense under section 23(a). And the contribution was deductible, as the federal tax regulation stated, whether the benefit inured to an "employee or former employee . . ." (*supra*, p. 32).

Since the Internal Revenue Code drew no distinction between active and retired employees, but treated both alike

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[67] 26 U.S.C. § 101(16) (1946 ed.).

whether the benefits received were from a pension fund or a health and welfare fund, it is patent that the identical treatment is required under section 302(c)(5) which in presently pertinent part is based on the Internal Revenue Code. Thus, history shows that the very language relied on in section 302(c)(5) to show differentiation establishes identity when traced to its origin in the Internal Revenue Code. In short, the word "employee" when used in the Internal Revenue Code meant present and former employees; it did not acquire a different meaning when consciously transplanted to section 302(c)(5) for the very purpose of assuring identity in treatment. And the requirement of separate maintenance of a pension fund and a health and welfare fund which existed under the Internal Revenue Code did not mean, when transplanted to section 302(c)(5), that a pension fund can grant benefits to retired employees but a health and welfare fund cannot, when that was not the meaning of separateness under the Internal Revenue Code.

Except for a confirmatory change later discussed (*infra*, p. 37), the tax situation which existed in 1946 when section 302(c)(5) was initiated and in 1947 when it was enacted prevails as well today. A qualified pension fund and a health and welfare fund are both exempt from taxation by section 501(a) of the Internal Revenue Code of 1954. Tax-exempt status of a pension fund is governed by section 401, and of a health and welfare fund by section 501(c)(9). The employer's contribution to a health and welfare fund is tax deductible as an "ordinary and necessary" business expense under section 162(a);[68] the contribution to a pension fund is deductible by the employer under section 404; and the distribution from the pension fund is taxable to the beneficiary upon his receipt of it under section 402(a). Now as

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68 1 Federal Tax Regulations § 1.162-10(a) (1964) states that: "Amounts paid or accrued within the taxable year for dismissal wages, unemployment benefits, guaranteed annual wages, vacations, or a sickness, accident, hospitalization, medical expense, recreational, or similar benefit plan, are deductible under section 162(a) if they are ordinary and necessary expenses of the trade or business."

then, the federal tax regulations state that a pension plan "is for the exclusive benefit of employees or their beneficiaries even though it may cover former employees as well as present employees and employees who are temporarily on leave, as, for example, in the Armed Forces of the United States";[69] now as then, in determining the tax deductibility of the employer's contribution, "It is immaterial whether the plan covers present employees only, or present and former employees, or only former employees";[70] now as then, the requirement that a pension fund be for the exclusive benefit of employees is aimed at the "subterfuge" by which the fund would be used to discriminate in favor of shareholders, officers, supervisors, or highly compensated employees.[71]

The upshot is clear. As the words "for the exclusive benefit of his employees" in the Internal Revenue Code do not bar retired employees, neither do the words "for the sole and exclusive benefit of the employees" in section 302(c)(5) bar retired employees, in view of the genesis of the 302(c)(5) words in the Internal Revenue Code. Furthermore, tax exempt status of a welfare fund is unaffected by the grant of benefits to retired employees.[72] To repeat, therefore, the words of Senator Taft, "The Byrd amendment carefully defines the recognized forms of health and welfare benefits which such funds have been used for, and which have been legislated about in the Internal Revenue Code, which are found to be funds for beneficial purposes, which should receive special tax exemption, and should have special consideration from the Government. That is what the Byrd amendment does."[73] It would be a queer sort of

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69 1 Federal Tax Regulations § 1.401-1(b)(4) (1964).

70 Id., § 1.404(a)-1 (a).

71 Id., § 1.401-1(b)(3).

72 Opinion Letter, Director, Tax Rulings Division, June 27, 1963, reproduced in Appendix, *infra*, pp. 65-66.

73 92 Cong. Rec. 5494.

"special consideration from the Government" to invalidate tax-exempt funds for "beneficial purposes."

5. *The expansion of permitted purposes in 1959:* In 1959, Congress amended section 302(c) of the Labor Management Relations Act, 1947, to add that a jointly administered trust fund could be established "for the purpose of pooled vacation, holiday, severance or similar benefits, or defraying costs of apprenticeship or other training programs." [74] This amendment was adopted to allay "a doubt as to the legality of employer contributions to joint trust funds" for such purposes.[75] It was designed to overcome restrictive judicial interpretation of the purposes permitted by section 302(c) "in order that courts will not strike down, as illegal, labor and management agreements . . . which promote harmony in an industry and redound to the benefit of employer and employee alike." [76] It is to the last degree unimaginable that, in the face of explicit expansion of permitted purposes to remove doubt as to the legality of "pooled vacation, holiday, severance or similar benefits, or . . . apprenticeship or other training programs," Congress thought that it had in 1947 enacted, or in 1959 would have continued, a prohibition against health benefits for retired employees. *Blassie* v. *Kroger Co.*, 59 LRRM 2034, 2042 (C.A. 8, April 23, 1965).

D. Related Statutes Show That Congress Did Not by Section 302(c)(5) Intend to Bar Health Benefits for Retired Employees.

Other federal enactments dealing with health benefits for the retired employee show the solicitude of Congress for him and the untenability of imputing to Congress any intention that section 302(c)(5) shall preclude the grant of health benefits to him. And of course, in striving for in-

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[74] 29 U.S.C. § 186, 73 Stat. 537 (1959).

[75] H. Rep. No. 741, 86th Cong., 1st Sess., 23; 105 Cong. Rec. 886.

[76] *South Louisiana Chapter* v. *International Brotherhood of Electrical Workers, Local Union 130*, 177 F. Supp. 432, 437 (E.D. La.).

formed interpretation, courts "look at later statutes 'considered to throw a cross light' upon an earlier enactment.'"[77]

1. The 1962 amendment of section 401 of the Internal Revenue Code of 1954.

Until 1962, in order to maintain its tax-exempt status, a pension fund could not be combined with a health and welfare fund. On October 23, 1962, Congress amended Section 401 of the Internal Revenue Code of 1954, related to qualified pension, profit-sharing and stock bonus plans, to provide that a single fund within prescribed limits could grant both pension and health benefits to retired employees and still enjoy tax-exempt status:[78]

> Under regulations prescribed by the Secretary or his delegate, a pension or annuity plan may provide for the payment of benefits for sickness, accident, hospitalization, and medical expenses of retired employees, their spouses and their dependents, but only if—
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> (1) such benefits are subordinate to the retirement benefits provided by the plan,
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> (2) a separate account is established and maintained for such benefits,
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> (3) the employer's contributions to such separate account are reasonable and ascertainable,
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> (4) it is impossible, at any time prior to the satisfaction of all liabilities under the plan to provide such benefits, for any part of the corpus or income of such separate account to be (within the taxable year or thereafter) used for, or diverted to, any purpose other than the providing of such benefits, and
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> (5) notwithstanding the provisions of subsection (a) (2), upon the satisfaction of all liabilities un-

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[77] Frankfurter, Reflections on Reading Statutes, in Westin, The Supreme Court: Views from Inside, 90 (1961). *E.g., N.L.R.B.* v. *Drivers Local Union No. 639*, 362 U.S. 274, 291-292.

[78] 26 U.S.C. § 401(h), 76 Stat. 1141 (1962).

> der the plan to provide such benefits, any amount remaining in such separate account must, under the terms of the plan, be returned to the employer.

Explaining this amendment, the Conference Report stated that it "would allow a pension or annuity plan, qualified under the Internal Revenue Code of 1954, to provide for the payment of benefits for sickness, accident, hospitalization, and medical expenses of retired employees and their spouses and dependents, if such benefits are subordinate to the retirement benefits provided by the plan. It would make it possible for an employer, where he chooses to do so, to provide these benefits through a qualified pension or annuity plan, rather than being required to do so separately, as under existing law." [79]

The explanations on the House and Senate floors are instructive. Congressman Byrnes, one of the managers upon the part of the House, stated that:[80]

> . . . H.R. 10117 would allow an employer to provide for the payment of benefits for accident and health expenses to retired employees, their spouses, and dependents under a pension plan qualified under the Internal Revenue Act of 1954. Under existing law an employer wishing to provide such benefits must do so under a separate plan. Under no circumstances can he combine a pension plan with an accident and health plan. Obviously, this adds to the administration of such plans.
>
> Pension plans and accident and health plans are becoming quite common in industry. They are essential if we are to adequately provide for the retired worker through the private sector of the economy. Otherwise, he will become increasingly dependent on Government. The worker earns the benefits he receives under these plans. They are not handouts from the Federal Govern-

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79 H. Conf. Rep. No. 2555, 87th Cong., 2d Sess., in 2 U.S. Cong. & Adm. News 3934 (1962).

80 108 Cong. Rec. 19090.

ment, and, therefore, enable him to maintain his self-respect and dignity. We have heard too much talk lately about the Government assuming more and more responsibility in this area.

Any loss in Federal revenue under this bill would be insignificant, if not negligible. The cost of both types of plans are now deductible by the employer, and is not considered income to the employee. The bill merely enables the employer to consolidate the two into one.

This should have a desirable effect on the growth of both pension plans and accident and health plans. . . .

Congressman Curtis stated:[81]

I rise today to support a bill, H. R. 10117, which I have introduced whose purpose is to clear away a legislative obstruction to the further progress of our private enterprise institutions in meeting the needs of our people in this area.

* * *

The obstruction of which I speak is the present language of section 401. At present, pension plans cannot fund for health insurance for their beneficiaries. Indeed if they do they endanger their tax-exempt status. Through the growth of pension funds—they contain some $50 billion and cover some 15 million workers—there exists an important vehicle for providing many millions of our retired workers with the means to pay their health care costs. Removing the current obstruction, great progress in this area is possible.

The importance of this proposal must be seen in the light of the related progress in the overall health care field, especially in the dramatic advances in health insurance. Prepayment—that is payment for health care benefits after 65 during one's working years—and non-cancellable insurance are now recognized features of available policies. Labor-management agreements are getting more and more into the field, as workers seek health care protection not only for their working years but for their retirement years as well. This proposal

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[81] *Ibid.;* see also 108 Cong. Rec. 19089 (Congressman Mills).

fits into this movement and the progress of one can assist the progress of the other. . . .

* * *

This bill is not offered as a final solution to all the problems in this important area of health care; rather it is offered as one constructive step forward in strengthening the private enterprise system's ability to meet the problem. . . .

And Senator Byrd, who initiated trust fund regulation in 1946 which eventuated in the enactment of section 302(c)(5) of the Labor Management Relations Act, 1947, stated that:[82]

. . . H. R. 10117 relates to the qualifications of certain pension trusts under the Internal Revenue Code. Under existing Treasury regulations, a qualified pension trust may not include benefits for sickness, accident, hospitalization or medical expenses for retired employees and retain qualification for income tax exemption or for deductibility of employer contributions made under the retirement plan.

On the other hand, the existing law permits contributions under accident and health plans for employees to be deducted by employers and excluded from gross income of employees.

H. R. 10117 would eliminate the prohibitions against qualified pension trusts including sickness, accident, hospitalization or medical benefits for their beneficiaries. It would permit these benefits and pension benefits to be funded together under a single trust provided separate accounts are kept—so the contribution for the sickness, et cetera, benefits can be ascertained —and provided the sickness, et cetera, benefits are subordinate to the pension benefits.

. . . Revenue effects would be negligible because the bill primarily simplifies administration of plans for medical benefits and for pension benefits by making separate trusts unnecessary.

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82 108 Cong. Rec. 22539.

The 1962 amendment conclusively confirms that the separateness of a pension fund from a health and welfare fund under the Internal Revenue Code, and the consequent related separateness of the two under section 302(c)(5) of the Labor Management Relations Act, 1947, was never intended to preclude the grant of health benefits to retired employees. Abolition of compulsory separateness under the Internal Revenue Code was designed to facilitate the extension of health benefits on retirement. While that particular means of facilitation cannot apply to a jointly administered trust fund, because of the continuing bar against combination independently contained in section 302(c)(5), the universal acceptance in Congress of the desirability of health benefits on retirement precludes the view that by section 302(c)(5) Congress had made this good totally unavailable to the worker in an industry in which joint administration prevails. As Congressman Curtis noted, "Labor-management agreements are getting more and more into this field, as workers seek health care protection not only for their working years but for their retirement years as well" (*supra*, p. 39). It was never suggested that the benefits available through collective bargaining are different based on whether joint administration or sole employer administration is the agreed method of handling. It would come as a shocking surprise to Congress to learn that it had forbidden health benefits on retirement in the coal industry, because joint administration exists there, but had permitted it in the steel industry, because joint administration does not exist there. Congress drew no line between the coal miner and the steel worker.

2. Federal Employees Health Benefits Act of 1959; Retired Federal Employees Health Benefits Act.

On September 28, 1959, Congress enacted the Federal Employees Health Benefits Act of 1959.[83] This statute extended health benefits to federal employees in active service

[83] 5 U.S.C. § 3001, 73 Stat. 708 (1959).

to be continued on their behalf on retirement. On September 8, 1960, Congress enacted the Retired Federal Employees Health Benefits Act.[84] This statute extended health benefits to already retired federal employees whose active service had ceased at a time when no health benefits were available for either active or retired employees. In combination the two statutes granted health benefits to all federal employees whether active or retired.

The provision for health benefits in the federal service was based on the fact that the grant of these benefits to active and retired employees was commonplace in private industry.[85] "At the present time, a wide gap exists between the Government, in its capacity as employer, and employers in private industry, with respect to health benefits for employees. Enlightened, progressive private enterprise almost universally has been establishing and operating contributory health benefits programs for its employees. Until now, the Government has made scant progress in this area. This bill is designed to close the gap wihch now exists and bring the Government abreast of most private employers."[86] Strong approval was uniformly expressed on the floors of the House and Senate for the extension to active and retired

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84 5 U.S.C. § 3051, 74 Stat. 849 (1960).

85 Hearings, Senate Subcommittee on Post Office and Civil Service, on S. 94, 86th Cong., 1st Sess., 83, 186-187, 257-258, 296-297, 310-312 (1959); Hearings, House Committee on Post Office and Civil Service, on S. 2162, 86th Cong., 1st Sess., 51, 292-293, 359 (1959); Hearings, Senate Committee on Post Office and Civil Service, on S. 2575, 86th Cong., 1st Sess., 18, 22, 24-25, 31, 34, 41 (1959); Hearings, House Committee on Post Office and Civil Service, on S. 2575, 86th Cong., 2d Sess., 24 (1960). A study prepared by the Bureau of Labor Statistics at the request of the Bureau of the Budget to assist it and the Congress in considering the extension of health benefits to retired federal employees shows that: "When 112 major collectively bargained health and insurance plans made provision for extension of health benefits to workers upon retirement, two-thirds (76) also extended coverage to employees who had already retired." Landay, *Extension of Health Benefits to Prior Pensioners*, 83 Monthly Lab. Rev. 841 (1960).

86 H. Rep. No. 957, 86th Cong., 1st Sess., in 2 U.S. Cong. & Adm. News 2914 (1959).

federal employees of the same health benefits already enjoyed by active and retired employees in the private sector of the economy.[87] The bill "does for Federal employees no more than is being done for millions of private employees";[88] "Private industry has long had health coverage plans for its employees and it is time that the Federal Government, the nation's largest employer, provide equal benefits in this respect";[89] "Not to give the Federal employees the same kind of health insurance opportunities and health benefits which are available in the best plans for private employees is . . . both unsound from the point of view of national justice and unwise in terms of making certain that the Government has an opportunity to recruit a very high level of Federal employees";[90] "The Federal employees . . . definitely need a program which will provide them with health insurance benefits during their active service with the Government and after their retirement."[91]

In extending in 1959 health benefits to active federal employees and providing for their continuation on retirement, the single but repeated expression of regret was that the same health benefits had not also been extended to already retired federal employees, and the reiterated promise was that this deficiency would be cured in the next session.[92] "This group of loyal retired federal employees has not been forgotten . . .";[93] " 'We consider it essential that legislation for active and future retirees be supplemented in the near future by providing similar benefits for those already re-

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[87] 105 Cong. Rec. 13562-13564, 13568, 16861, 16862, 17553, 17555-17561; 106 Cong. Rec. 17078-17079.

[88] 105 Cong. Rec. 13562.

[89] *Ibid.*

[90] 105 Cong. Rec. 13563.

[91] 105 Cong. Rec. 17556.

[92] 105 Cong. Rec. 13562, 13564, 13565, 13568, 17560, 17561.

[93] 105 Cong. Rec. 13562.

tired.' "[94] The promise was kept in 1960. Congress met its "clear obligation . . . to provide equal treatment, in terms of health and medical benefits, for those loyal former employees who completed their service and earned their retirement before becoming eligible for such benefits under Public Law 86-382."[95] "The Federal Government cannot ignore the progressive examples of many large private employers who sponsor health benefit programs and have included in these programs persons already retired";[96] "We recognize that for the 415,000 retirees who will benefit from this act, that we are doing in large measure what many private industries have done for their employees, and we hope others will do the same."[97]

It is totally inconceivable that Congress, while looking to private employment for its own example in extending health benefits to federal employees on retirement, should have imputed to it an intention to bar granting health benefits to retired employees who work in that sector of the private economy which is governed by section 302(c)(5). The anomoly is glaringly accentuated by the probability that a good part of the experience in private employment which impressed Congress had been furnished by health benefits plans under joint administration. The solicitude of Congress for the retired employees, whether public or private, did not stop short at section 302(c)(5).

E. The Method of Financing Health Benefits for the Retired Employees Is Not Relevant to the Validity of Their Coverage.

Under the plan in this case, benefits paid by the medical-hospitalization trust fund are financed by contributions to the fund from each employer at an hourly rate for each

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[94] 105 Cong. Rec. 17561.

[95] H. Rep. No. 1930, 86th Cong., 2d Sess., in 2 U.S. Cong. & Adm. News 3436 (1960).

[96] 105 Cong. Rec. 16861.

[97] 106 Cong. Rec. 17078.

hour of work performed for the particular employer by his employees; contributions were "at the rate of 12¢ per hour per man during 1962 and 1963 and 15¢ per hour during 1964."[98] The benefits paid are therefore cost-free to the employee, whether active or retired. This is thus a fairly typical plan in which the cost is financed solely by the employers rather than shared by the employees.

The District Court found that "the benefits presently paid to the retirees and their wives are provided for by extra assessments now being paid by the employers and not out of surplus contributions which accumulated during the time the former employees were actively employed" (58 LRRM 2692). By "extra assessments" the District Court presumably means that the hourly rate of contributions was set at a higher figure in order to furnish the wherewithal for defraying from current income the expense of paying benefits to the retired employees. Since part of the current contribution was used to finance the benefits for the retired employees, the District Court found that the employers' payment was illegal based on its fundamental conclusion that retired "persons are no longer employees," and therefore that the employers' payment was not "for the sole and exclusive benefit of the employees . . ." (58 LRRM at 2692). As that conclusion is untenable, and retired employees are within the authorized coverage of a jointly administered welfare fund, the District Court's concern with the method of financing the benefits received by the retired employees is irrelevant.

Insofar as section 302(c)(5) is concerned, in addition to payments to the trust by the employer, contributions may be received by the trust "from the employee, active or retired, or from another source in his behalf. . . ." *Blassie v. Kroger Co.*, 59 LRRM 2034, 2041 (C.A. 8, April 23,

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[98] Plaintiff's brief in the District Court, p. 8. We disregard as irrelevant for present purposes the monthly amount paid on behalf of associate employees (*supra*, p. 3).

1965). The sole requirement prescribed by section 302(c)(5) with respect to the source of contributions to the fund is that, as to the employer's contributions, "(B) the detailed basis on which such payments are to be made is specified in a written agreement with the employer. . . ." This requirement "is obviously directed only to the collective bargaining employer's payments and not to such supplemental ones." *Blassie* v. *Kroger Co., supra,* at 2041. Accordingly, while the employer's basis of payment must be detailed in an agreement with him, the method of financing the cost of a welfare plan—how much shall be paid by whom—is a matter determined by collective bargaining.

Thus, in *Blassie* v. *Kroger Co., supra,* at 2038, reversing, 225 F. Supp. 300, 306-307, the cost of the benefits for the retired employees was shared by the retired employees and the welfare fund. Since the fund's only source of income (other than the retired employees' own contribution) was payments received from employers, it is clear that the benefits for the retired employees were partly financed by the employers. And since the share paid by each retired employee was ten dollars per month (raised from 5 dollars per month), in contrast with the $31.70 per month paid by the contributing employers for each active employee who averaged 23 or more hours of work per week for the month, it is also clear that the employers' contributions financed the major part of the benefits for the retired employees. In *Local 688, Teamsters* v. *Townsend,* 59 LRRM 2048 (C.A. 8, April 23, 1965), reversing, 229 F. Supp. 417, 418, the benefits to be paid to the employees after retirement were financed by contributions from the employers in the amount of two cents for each hour of basic wage paid to the active employees.

The plans in this case, *Blassie* v. *Kroger Co.,* and *Local 688, Teamsters* v. *Townsend* illustrate the variety of collectively-bargained methods of financing benefits for re-

tired employees. The cost may be borne wholly by the employer, shared with the retired worker, or borne wholly by the retired worker. Even where the cost is wholly financed by the retired worker, the group coverage gives him the advantages of lower premiums, the absence of medical, age, and other restrictions on coverage, and the rarity of contract cancellations. The lower rate results from averaging the cost of providing benefits for the active and retired employees, and is particularly advantageous to the retired employees because the active workers, being on the whole much younger, have lower utilization rates than the retired workers. The method of financing may alter with the employee's change from active to retired status. On retirement the employer may assume the full cost of benefits theretofore jointly-financed or *vice versa,* and the amount of the contribution may change.[99]

The methods of financing are thus quite variegated. Collective bargaining shapes them to the form suitable for the particular industrial community. And, so long as the basis of the employer's contribution is detailed in an agreement with him, the form the financing takes is irrelevant under the terms of section 302(c).

F. Summary

Accordingly, the text of section 302(c)(5), its particular legislative history, the general legislative milieu enveloping the problem, and public policy combine to require the conclusion that an employee on retirement is eligible to continue to receive health benefits from a jointly administered trust fund. No good reason has been suggested, and none exists, to suppose that Congress, while allowing the payment of pensions on retirement, precluded the grant

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99 The statements in this paragraph are based on Bull. No. 1280, *op. cit. supra,* p. 14, n. 7, at 8-11; Bull. No. 1274, *op. cit. supra,* p. 14, n. 7, at 6-9; Bull No. 1296, *op. cit. supra,* p. 14, n. 7, at 3-4; Bull. No. 1293, *op. cit. supra,* p. 14, n. 7, at 6-7.

of health benefits on retirement. Responsive to the realities of the economic situation the common law developed the rule that a worker on strike retained his employee status.[100] The same response to economic reality requires the conclusion that for the purpose of pension and health benefits the term "employee" means an active or retired employee. "The range of judicial inventiveness will be determined by the nature of the problem."[101] The term "employee" has traditionally been molded to fit the particular problem. What it means "must be answered primarily from the history, terms and purposes of the legislation. The word 'is not treated by Congress as a word of art having a definite meaning. . . .' Rather 'it takes color from its surroundings . . . [in] the statute where it appears' . . . , and derives meaning from the context of that statute, which 'must be read in the light of the mischief to be corrected and the end to be attained.' "[102] Given that orientation, the conclusion is clear that section 302(c)(5) does not bar retired employees from receiving health benefits. "There is no good reason . . . to restrict the term 'employee' sought to be done in this case. That term, like other provisions, must be understood with reference to the purpose of the Act and the facts involved in the economic relationship. Where all the conditions of the relation require protection, protection ought to be given."[103] "Any plan for the health and economic well-being of employees, whether it be one gratuitously granted or one hammered out by hard bargaining, would normally be expected to embrace the crises of unemployment, retirement, and disability, as well as those of the better times of active employment. An opposite result, with benefits available only when the weather is fair and the needs are less,

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100 *Jeffery-DeWitt Insulator Co.* v. *N.L.R.B.*, 91 F.2d 134, 136-138 (C.A. 4).

101 *Textile Workers Union* v. *Lincoln Mills*, 353 U.S. 448, 457.

102 *N.L.R.B.* v. *Hearst Publications*, 322 U.S. 111, 124.

103 *Id.* at 129.

would be ironical in application and, we feel, should not be reached without a clearer indication of congressional intent than we have here." *Blassie* v. *Kroger Co.*, 59 LRRM 2034, 2041 (C.A. 8, April 23, 1965).

II. SECTION 302(c)(5) OF THE LABOR MANAGEMENT RELATIONS ACT, 1947, DOES NOT BAR EMPLOYEES AND OFFICERS OF THE CONTRACTING UNION FROM COVERAGE AS BENEFICIARIES OF A JOINTLY ADMINISTERED PLAN.

We shall show, as the Court of Appeals for the Eighth Circuit held, that section 302(c)(5) of the Labor Management Relations Act, 1947, does not bar participation by employees and officers of the contracting union as beneficiaries of a jointly administered trust fund. *Blassie* v. *Kroger Co.*, 59 LRRM 2034, 2044-45.

A. The Extension of Benefits to Employees and Officers of the Contracting Union is Squarely Within the Text of Section 302(c)(5).

The contracting union is of course a distinct entity with the status of an employer vis-a-vis its own employees. This conclusion is indeed compelled by statutory definition. Section 2(2) of the National Labor Relations Act defines the term "employer" to include any labor organization "when acting as an employer." That definition is made applicable to section 302(c)(5) by section 501(3) of the Labor Management Relations Act, 1947. Accordingly, as with the National Labor Relations Act, so with section 302(c)(5), "It follows that when a labor union takes on the role of an employer the Act applies to its operations just as it would to any other employer." *Office Employes International Union, Local No. 11* v. *N.L.R.B.*, 353 U.S. 313, 316. And this conclusion is in keeping with the policy of Congress that " 'In its relations with its own employees, a labor organization ought to be treated as an employer. . . .' " *Id.* at 318.

As the contracting union is an employer, coverage of its employees and officers as beneficiaries of the medical-hospitalization and pension funds is squarely within the terms of section 302(c)(5). That section explicitly states that different employers may contribute to a single trust fund. Thus, payment may be made to a fund by an employer not only "for the sole and exclusive benefit of the employees of such employer" but also for them "jointly with other employers making similar payments. . . ." As a separate and distinct employer, the union is therefore precisely within the class of "other employers" eligible to make "similar payments" for their employees who participate "jointly" with other employees.

Payment by a contracting union as an employer to a jointly administered trust fund for its employees and officers "thus fits the technical structure" of section 302(c)(5) precisely. *Blassie* v. *Kroger Co.*, 59 LRRM 2034, 2043, 2044, 2045 (C.A. 8, April 23, 1965). The District Court in this case therefore indulges the sheerest *ipse dixit* when it states that the statutory term "employer" does not cover "the union in its capacity as an employer of its own personnel," and that "Congress was not concerned, in this legislation, with the well being of employees looking to the union for their compensation" (58 LRRM at 2691). That conclusion does violence to the text and is unsupported by either statutory purpose or history.

B. The Extension of Benefits to Employees and Officers of the Contracting Union is Outside the Substantive Evil Against Which Section 302(c)(5) is Aimed, and is Consistent With the Procedural Means Adopted by Section 302(c)(5) to Prevent Realization of the Substantive Evil.

Employees and officers of a union, no less than any other class of employees, need health, welfare, and pension benefits. The grant of these benefits to them, as to any other employees, partakes of no evil against which section 302 (c)(5) is directed but is instead part of the positive good it serves.

To suggest a substantive evil, the specter has been invoked that to allow a union in its capacity as an employer to participate in a jointly administered fund "would be to give union leaders an *opportunity* to funnel welfare benefits to union employees at the union leaders' discretion." *Kroger Co.* v. *Blassie,* 225 F. Supp. 300, 310 (E.D. Mo.) (emphasis in original). In reversing, the Court of Appeals for the Eighth Circuit gave this chimera short shrift. "We see no particularized danger of abuse. Payments are made to a jointly administered fund. There is present only the same possibility of abuse which is at hand when any trustee or group of trustees chooses to be dishonest." *Blassie* v. *Kroger Co.,* 59 LRRM 2034, 2043-44. A dishonest trustee wont to give unauthorized benefits is not confined to union employees or officers as the recipients of his impermissible largesse. As to any of the beneficiaries of a fund it can with equal merit be said that "an *opportunity*" exists "to funnel" benefits to them "at the union leaders' discretion." Among the members employed by a company contributing to the fund may be those who have such substantial political influence within the contracting union as to make them far likelier recipients of unauthorized largesse than a union bookkeeper or typist. This line, therefore, leads to the conclusion that *no* employees should be beneficiaries of a jointly administered trust fund and that Congress was mistaken in enacting section 302(c)(5) at all.

The line is patently misdirected. Risk of abuse is inherent and inescapable whether the fiduciary is a bank, a corporate officer, a lawyer, or anyone else. It is necessary to paint with a finer brush. The employee and officer of the contracting union is no less an "employee" than is the employee of any contributing company. The two cannot be distinguished by the possibility of abuse since this inheres in the coverage of either. The requirement which does not obtain is that the same standards of payment, eligibility, and benefits apply to both. If, in administer-

ing an even-handed standard, a union employee or officer is unjustly favored, the remedy is to curb that particularized abuse, not to ban the whole class as outlaws.[104] It would be a wholly unnatural state of affairs, and therefore is a wholly artificial reading the statute, to exclude from the benefits of the fund the employees of the contracting union who serve the interests of all the employees and should therefore be expected to share the same employment benefits with them.

Furthermore, the participation of the contracting union in the fund as an employer is entirely consistent with the procedural means embraced in section 302(c)(5) to prevent realization of the substantive evil. As stated, the means adopted by Congress was to define the purposes for which the fund could be established, to require that the benefits payable be specified in detail in the trust agreement, and to prescribe joint union-employer administration of the fund (*supra*, p. 24).

Coverage of union employees and officers presents no problems of compatibility with the defined purposes or of particularization of the benefits in the trust agreement. Nor does it offend the statutory requirement of equal representation of employees and employers in the administration of the fund. It is too plain for anything but statement that of course the contracting union may have no voice in choosing the employer representatives. But the consequence of this disability is, not that it is not an employer within the meaning of section 302(c)(5) for the purpose of its own employees, but that its status as an employer does not extend to its participation in the selection of employer representatives, and this for the simple reason that in view of its dominating characteristic as an employee representative it would do violence to the principal of equal representation were it to share in the selection of the employer representatives.

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104 See, *Upholsterers' International Union* v. *Leathercraft Furniture Co.*, 82 F. Supp. 570, 575 (E.D. Pa.).

The union occupies a dual role, an employer for one purpose and an employee representative for another, and all that is necessary is an accommodation of the two roles, not the destruction of one in order to be sure that it does not intrude into the other. An obligatory "either or reading of the statute," with no range for adjustment of the parts, has nothing to commend it but "a bit of verbal logic from which the meaning of things has evaporated."[105] It is essential to sound interpretation to abjure a purely verbal dilemma. "All rights tend to declare themselves absolute to their logical extreme. Yet all in fact are limited by the neighborhood of principles of policy which are other than those on which the particular right is founded, and which become strong enough to hold their own when a certain point is reached."[106] One principle of policy is that a union is an employer vis-a-vis its own employees. The other principle of policy is equal representation in the administration of a trust fund. The first principle is fulfilled by allowing the union employees and officers to be beneficiaries of the fund. The second principle is respected by excluding the union from participating in the selection of the employer representatives. Each principle is accommodated without injury to either and with the greatest good to all.

The nonparticipation by the union in the selection of the employer representatives comes by command of the statute, not by grace of contract. The Union "is entitled to no voice in the selection of employer trustees. This is a matter of absence of right by the terms of the statute; it is not something which can be affected by contract. Of course, the union is in a dual position, that of employer of its employees, and that of basic union status with respect to the contributing employers. But this dualism of position is not irreconcilable with the statute and the functioning of a § 302(c)(5) trust." *Blassie* v. *Kroger*

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[105] *Phelps Dodge Corp.* v. *N.L.R.B.*, 313 U.S. 177, 190-191.

[106] *Hudson County Water Co.* v. *McCarter*, 209 U.S. 349, 355.

Co., 59 LRRM 2034, 2044 (C.A. 8, April 23, 1965). See also, *Local No. 688, Teamsters* v. *Townsend*, 59 LRRM 2048 (C.A. 8, April 23, 1965).

The Court of Appeals for the Eighth Circuit thus rejected the inflexibility of the decision in *Local No. 688, Teamsters* v. *Townsend*, 229 F. Supp. 417 (E.D. Mo.), which it reversed, 59 LRRM 2048. The District Court in that case had stated its disbelief that "the union employee can be brought under the Trust simply by providing in the agreement that the union employee's employer cannot participate in the selection of the employer trustees. The statute provides that they have that right if they are employers, and the court is of the opinion that it cannot be circumvented by agreement." 229 F. Supp. at 421. Thus, the District Court had inexorably imputed a "right" to the union as an employer, gave the "right" such implacability that relinquishment of it by agreement was deemed circumvention, and all for the purpose of establishing that the union could have no status as an employer to which the "right" could attach. Solemnly to intone that a self-defeating "right" cannot be relinquished by agreement, instead of reading the agreement as contractual affirmation of the statutory principle of equal representation, is to demonstrate again that "the word 'right' is one of the most deceptive of pitfalls; it is so easy to slip from a qualified meaning in the premise to an unqualified one in the conclusion."[107] The only relevant right is that the employers shall have equal representation in the administration of the trust fund, and observance of that right requires that the union shall not in any capacity participate in the selection of employer representatives. When that right is respected, there is no additional right which demands that the union employees and officers shall not be beneficiaries of the trust.

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107 *American Bank & Trust Co.* v. *Federal Reserve Bank of Atlanta*, 256 U.S. 350, 358.

C. No Basis Exists for Distinguishing Between Union Employees and Officers so as to Allow Union Employees but Not Union Officers to Participate as Beneficiaries of a Jointly Administered Trust Fund.

It has been suggested that a basis exists for statutorily barring union officers from participating as beneficiaries of a jointly administered trust fund which does not apply to union employees. According to the District Court for the Eastern District of Missouri, while a union is the employer of its "clerks, secretaries, and the like," it is not "an employer of its officers. If officers were considered employees of the union, and if such officers would organize themselves and bargain with their employer-union, a situation would exist where such officers would be bargaining with themselves. Such a situation would be untenable." *Kroger Co.* v. *Blassie,* 225 F. Supp. 300, 309. In reversing, the Court of Appeals for the Eighth Circuit observed that (*Blassie* v. *Kroger Co.,* 59 LRRM 2034, 2045):

> An officer of a union is an employee of that union just as the president of a corporation is its employee. He is no less an employee for the purposes of a jointly administered fund under § 302(c)(5) because he may also possess managerial capacity and not be in a position to bargain collectively with his own union as his employer. The right collectively to bargain is an entirely different question. Section 302(c)(5) speaks only of "the employees" of an employer. It draws no distinction among employees. We have noted before that the statute has a relationship with existing Internal Revenue Code provisions and we now note further that these code provisions, § 165(a)(3)(B) and (4) of the 1939 Code and § 401(a)(3)(B) and (4) of the 1954 Code, permit the inclusion of officers and supervisors if there is no discrimination in their favor.

> The considerations which we have found persuasive with respect to trust employees and non-officer union employees have application here. Again, we see no danger of special opportunity for abuse and we deem it natural, and not unexpected, that union officers be able to qualify for benefits no more favorable than those available to other beneficiaries.

To begin with, whether union officers may "organize themselves and bargain with their employer-union" is a question not germane to the interpretation of section 302(c)(5). For the premise that particular union officers may not combine to bargain collectively does not support the conclusion that the union is not their employer. Some one must be their employer and there is no one but the union. The presidents and vice-presidents of every contributing company have that company as their employer. Union officers are in no different position.

It may be that the high rank of particular officers, corporate or union, so allies them with their employer as to constitute them managerial employees precluded from bargaining collectively on their own behalf through a representative of their own choosing. But this preclusion exists, not because they have no employer, but because they have a particular relationship to their employer which renders collective bargaining inappropriate. And this relationship is not determined merely by the designation "officer," but requires a detailed consideration of the actual duties, status, and responsibility of each individual, for the title "officer" ranges from the ceremonial to effective executive direction. Thus the National Labor Relations Board has found, vis-a-vis a union as an employer, a unit appropriate for collective bargaining composed of "All International representatives on the payroll of the Textile Workers Union of America . . . who serve as joint board managers (also referred to as business managers and as joint board directors), business agents, administra-

tive personnel, administrative assistants to industry directors, and organizers. . . ."[108]

It is therefore simply mistaken to say that a union is not the employer of its officers. All that can be said is that particular union officers, based on their particular status, may not bargain collectively with their employer. And this specialized situation, pertinent to the appropriateness of collective bargaining, is wholly irrelevant to the instant issue, namely, whether union officers as a class are ineligible by virtue of section 302(c)(5) to participate as beneficiaries of a jointly administered trust fund. That particular union officers may not be free to bargain collectively for themselves has nothing to do with debarring the class from eligibility as trust fund beneficiaries. Different considerations, to which we now turn, govern this question.

The precise relevant words of section 302(c)(5) are that money paid by an employer to a trust fund shall be "for the sole and exclusive benefit of the employees of such employer. . . ." The quoted words, as we have seen (*supra,* p. 31), were drawn directly from the Internal Revenue Code. And the Code was explicit that officers may be included as beneficiaries of a trust. All that was requisite to inclusion of officers was that, in qualifications, contributions, and benefits, the plan shall "not discriminate in favor of employees who are officers, shareholders, persons whose principal duties consist in supervising the work of other employees, or highly compensated employees. . . ."[109] As the federal tax regulations stated, "Among the employees to be benefited may be persons who are officers and shareholders" (*supra*, p. 32). The plan failed to be "for

[108] *Textile Workers Union of America,* 138 NLRB 269; see also, *American Federation of Labor-Congress of Industrial Organizations,* 120 NLRB 969; *International Ladies' Garment Workers' Union,* 131 NLRB 111, 142 NLRB 353, affirmed as to the NLRB's decision that business agents were not managerial employees, 339 F.2d 116 (C.A. 2). *Cf. Federation of Union Representatives* v. *N.L.R.B.,* 339 F.2d 126 (C.A. 2).

[109] 26 U.S.C. § 165(a)(3)(B) and (4) (1946 ed.).

the exclusive benefit of employees'' only if it was a ''subterfuge for the distribution of profits to shareholders,'' or ''if it discriminate[d] either in eligibility requirements, contributions or benefits by any device whatever in favor of employees who are officers, shareholders, persons whose principal duties consist in supervising the work of other employees, or the highly compensated employees'' (*supra*, p. 32). And this remains the situation under the Internal Revenue Code today.[110]

Accordingly, relating the words of section 302(c)(5) to their origin in the Internal Revenue Code, it is clear that officers are employees, and that a plan ceases to be for the exclusive benefit of employees only if it discriminates in favor of officers. This conclusion is particularly fitting in the case of union officers. For, having negotiated a plan on behalf of the employees they represent, it is natural that they should share its benefits on an evenhanded basis. Indeed, many officers, but for their election and service as officers, would be working at the trade and enjoying the benefits of the plan. Union service should not be the occasion for depriving them of the benefits they would have were they working at the trade. This is not, as the District Court in this case would have it, the expression of a ''political theory'' unrelated to the ''intent of Congress'' (58 LRRM at 2692). The intent of Congress cannot be faithfully ascertained by tearing the statute from its environment and disregarding the consequences of its operation within the milieu of its particular application.

In short, whatever its duty to bargain collectively with a representative of particular officers in its employ, the union remains the employer of all its officers. As an employer, the union may contribute to a jointly administered trust fund on behalf of its employee-officers, and they are

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[110] Internal Revenue Code of 1954, § 401(a)(3)(B) and (4); 1 Federal Tax Regulations § 1.401-1(b)(3) (1964).

eligible to be beneficiaries, subject only to the requirement that the plan shall not discriminate in their favor.

D. The "Possibility of Conflict of Interest" Between Its Role as a Labor Organization and Its Position as an Employer Does Not Deprive the Contracting Union of Employer Status Within the Meaning of Section 302(c)(5) Vis-A-Vis Its Own Employees.

One final theory for debarring union employees and officers needs to be considered, this one expressed by the District Court for the Southern District of New York. *United States Trucking Corp.* v. *Strong*, 239 F. Supp. 937, pending on appeal before the Court of Appeals for the Second Circuit, No. 29,656. As the basis for denying employer status to the contracting union, and of therefore debarring its employees from participating as beneficiaries of a jointly administered trust fund, the District Court in that case improvised a reason wholly unrelated to the words, purpose, or history of section 302(c)(5). The District Court was concerned that, in considering as an employer the benefits it desired to extend to its employees, the contracting union would have to take into account its "financial ability" to contribute to the trust fund at the same rate as the trucking company employers, the effect of the size of the contributions it would be required to make on the dues and assessments its members would have to pay to defray the cost, and "the effect the employees' rates of contribution will have on its own officers and employees and on the Union's salary and wage scale" (*Id.* at 940). The District Court therefore thought it "obvious" that, by reason of the union's position as an employer of its own employees, there was a "possibility of a conflict of interest" arising detracting from its duty of disinterested service as a representative of the trucking company employees, "and perhaps common interests arising between the Union and the trucking companies . . ." (*ibid.*). On this basis the District Court concluded that

the union could not be an employer vis-a-vis its own employees for the purpose of section 302(c)(5) (*ibid.*).

The Court of Appeals for the Eighth Circuit in *Blassie v. Kroger Co.*, 59 LRRM 2034, 2044-45, rejected in terms the reasoning of the District Court, observing that:

> We are aware that, in *United States Trucking Corp. v. Strong*, . . . [239 F. Supp. 937] (S.D. N.Y. 1965), the court held that payments by employers to a pension fund, to which the union was a contributor on behalf of its own employees, were not within the exception of § 302(c)(5). As we read that opinion the court arrived at its conclusion because it felt that the union had placed itself in a position of possible conflict of interest. We are not similarly persuaded by that remote possibility. In our view, the issue is whether the exception language of the statute has been met and satisfied and is not whether the union conceivably has placed itself in a position of conflict of interest. The latter does not fall into that category of mischiefs which the legislative history reveals to be the target of the statute.

The possibility of a conflict of interest which the District Court had conjured is entirely abstract. It is a conclusion wholly uninformed by any actual information or realistic appraisal of the amount of the contribution to the trust fund for its employees required of the union as an employer, the financial resources of the union, or the proportion to the union's total expenditures that its contribution to the fund represents. There is therefore a total lack of any factual foundation for genuinely evaluating whether the contribution has a magnitude which can even begin to affect the union's "financial ability" to pay, the amount of union dues and fees, or the level of wages for union employees and officers. Judging as abstractly as the District Court, the great likelihood is that the union's contribution *qua* employer is too minute to have the least influence upon its bargaining position *qua* employee representative.

Moreover, debarring the union from participation as an employer in the trust fund cannot in any event eliminate what minimal influence the size of its contribution could possibly exert on its bargaining stance. The District Court grants that the union can participate in any jointly administered trust fund except one in which the union is the bargaining representative of the employees of the other employers (239 F. Supp. at 941). Yet comparison of fringe benefits granted by different employers is an important factor at the bargaining table in support of a demand, so that, on the District Court's premise, there is a "possibility" that the union's demands as an employee representative would in any event be tempered by realization that it will be confronted with a request by its employees that it match as an employer any gain it succeeds in negotiating as an employee representative. To eliminate any possibility of a conflict of interest the union should therefore be required to eliminate any paid staff. The District Court stops short of this absurdity but the logic of its position does not.

The farfetched nature of the District Court's concern is further apparent from the fact that, while the participation of union officers and employees as beneficiaries of jointly administered funds is widespread (*supra,* pp. 5-6), union demands of employers in negotiations for an increase in contributions and benefits continues to be as vigorous as ever. And, to whatever extent the District Court's apprehension is not dismissible as altogether artificial, the peripheral mischief it perceives is altogether outside the central evil of "bribery", "extortion", and the use of funds "to perpetuate control of union officers, for political purposes, or even for personal gain" at which section 302 is aimed. *Arroyo* v. *United States,* 359 U.S. 419, 426-427.

Furthermore, the District Court's conception that a union's discharge of its duty of fair representation re-

quires elimination of any possibility of conflicting interests is altogether too aseptic for the workaday world. A union's constituency is composed of employee groups with competing interests and inherent in its role as an employee representative is the inescapable necessity of reconciling divergent pulls. Younger employees want across-the-board wage increases, while older employees put greater stock in pensions; any seniority system unavoidably prefers one group and disadvantages another; every allocation of work to one job classification or department disfavors another. "Conflict between employees represented by the same union is a recurring fact." *Humphrey* v. *Moore,* 375 U.S. 335, 349-350. "Inevitably differences arise in the manner and degree to which the terms of any negotiated agreement affect individual employees and classes of employees. The mere existence of such differences does not make them invalid. The complete satisfaction of all who are represented is hardly to be expected. A wide range of reasonableness must be allowed a statutory bargaining representative in serving the unit it represents, subject always to complete good faith and honesty of purpose in the exercise of its discretion." *Ford Motor Co.* v. *Huffman,* 345 U.S. 330, 338. In the face of the reality of conflicting interests among employees, and the responsibility entrusted to the union to resolve the differences in good faith, it is patent that the District Court's conception that "a possible conflict of interest" is of itself inconsistent with fair representation is too rarefied to be acceptable. In view of the compatibility with fair representation of far weightier conflicts, the minimal influence that can possibly be exerted by the union's contribution to the fund as an employer does not begin to count as a disqualifying factor.

Also wide of the mark is the District Court's invocation of the metaphor that an employer cannot "sit on both sides of the bargaining table" (239 F. Supp. at 940). That

quotation pertains to a union dominated or assisted by an employer through unfair labor practices. *American Enka Corp.* v. *N.L.R.B.,* 119 F. 2d 60, 62-63 (C.A. 4). Within the unfair labor practice area itself, in determining whether domination or assistance exists, total war between the employer and union is not the indispensable sign of an undominated and unassisted labor organization; "mutual forbearance and compromise need not impugn the independence of a union" *Western Union Tel. Co.* v. *N.L.R.B.,* 113 F. 2d 992, 997 (C.A. 2). Furthermore, when dealing with a union neither dominated nor assisted by employer unfair labor practices, analogy to a dominated or assisted union is quite unpersuasive even within the unfair labor practice area. *Local 60, Carpenters* v. *N.L.R.B.*, 365 U.S. 651, 653-654. Outside that area, as is the situation in this case, the analogy is not even colorably germane.

In short, the District Court relies upon "a possible conflict of interest" which is entirely abstract, upon a concept of the inconsistency of conflicting interests with faithful discharge of the duty of fair representation which is entirely unrealistic, and upon an analogy to an employer-assisted or dominated union which is entirely inapposite. And, in drawing upon this "circumambient aura,"[111] the District Court strays from the statutory text, its particularized history, and the specific mischief at which it is aimed. The infirmity of its premises invalidates its decision.

CONCLUSION

For the reasons stated, section 302 of the Labor Management Relations Act, 1947, does not bar retired employees and officers and employees of the contracting union from participating as beneficiaries of a jointly administered trust fund, whether a welfare fund as in the case

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[111] Judge Learned Hand concurring in *McComb* v. *Scerbo,* 177 F.2d 137, 141 (C.A. 2).

of retired employees, or a welfare fund and pension fund as in the case of union officers and employees.

Respectfully submitted,

Lester Asher
228 North LaSalle Street
Chicago, Illinois 60601

Bernard Dunau
912 Dupont Circle Building
Washington, D. C. 20036
Attorneys for Amicus Curiae

June 1965.

Certificate of Compliance

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with these rules.

Bernard Dunau
Attorney for Amicus Curiae

APPENDIX

U.S. TREASURY DEPARTMENT
INTERNAL REVENUE SERVICE
WASHINGTON 25, D. C.

[SEAL]

In reply refer to
T:R:EO:5
RMB

June 27, 1963

Steamfitters Local No. 601 Health and Welfare Fund
c/o Roy E. Cassel et al., Trustees
4112 West Burleigh Street
Milwaukee 10, Wisconsin

Gentlemen:

This is in reply to your letter of June 20, 1963, referring to a letter of January 30, 1963, requesting a clarification regarding the effect the extending of benefits to retirees may have upon the business deductions of contributing employers and on your tax exempt status.

It is stated that existing retirees, who were at one time active employees in the jurisdiction of Steamfitters' Local No. 601, presently receive life insurance and you are considering extending surgical-medical benefits to those presently retired, as well as those who will retire.

It is our conclusion that your present tax-exempt status will not be jeopardized by extending surgical-medical benefits to both employees who are presently retired and those employees who retire in the future. The exempt status of a voluntary employees' beneficiary association in no way depends upon whether coverage of specific individuals is attributable to specific contributions by, or on behalf of, such individuals. Thus a welfare fund could make payments for such benefits from existing reserves, employer

contributions or contributions made by the retired employees.

Concerning the question as to the deductibility of the employer contributions, under the stated circumstances, Section 6 of Revenue Procedure 62-28, C.B. 1962-2, at page 501, provides in part that a request for a ruling must be signed by the taxpayer (in this case an employer making contributions to your Fund) or, if such request is made by a representative of the taxpayer, the conference and practice requirements regarding the furnishing of a proper power of attorney, evidence of enrollment to practice, etc., must be met.

Since you are neither the taxpayer nor the recognized representative of a contributing employer, it is not feasible to issue the ruling requested. However, the following general information is furnished with respect to the employer contributions, is being understood that the contents thereof do not constitute a ruling on a specific matter.

In the instance where a determination is made that an expense of the kind involved herein relates to the regular conduct of the employer's business for promoting the general well-being and welfare of the employees, the consideration for which is intended to produce benefits flowing directly to the employer's business, the amounts paid by the employer would constitute ordinary and necessary expenses directly connected with the operation of the business, which would be deductible under the provisions of section 162(a) of the Internal Revenue Code of 1954.

Very truly yours,

/s/ John W. S. Littleton
Director, Tax Ruling Division